Petition

81-1008

Office - Supreme Court, U.S.
FILED
NOV 24 1981
ALEXANDER L. STEVAS,
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NO. 81-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

Burlington Northern Inc. and Southern Pacific Transportation Company,

Petitioners,

v.

United States of America and Interstate Commerce Commission,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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November 24, 1981

QUESTION PRESENTED

When a maximum rate order of the Interstate Commerce Commission is vacated and remanded by a reviewing court for further explanation of the Commission's action, this Court has held that the reviewing court is "without authority" to compel a reduction in tariff rates which have been filed pursuant to the Commission's order. *Consolidated Rail Corp.* v. *National Ass'n of Recycling Industries, Inc.*, ___ U.S. ___, 101 S.Ct. 775 (1981). For the court to go beyond review of the Commission's order, and dictate the level of rates which may be charged pending the Commission's decision on remand, would constitute impermissible judicial interference with the Commission's exclusive jurisdiction to determine the maximum level of rates. *Id.*

This Court has further held that a carrier may not charge, and a shipper may not pay, any rate other than the one contained in the tariff on file with the Commission. Under this "filed rate doctrine," not only carriers and shippers, but also *courts* are without authority to impose any rate different than the duly-filed tariff rate. *Arkansas Louisiana Gas Co.* v. *Hall*, ___ U.S. ___, 101 S.Ct. 2925 (1981).

This case concerns the proper application of these principles when (1) the Commission issues a rate order, (2) the Commission subsequently modifies this rate order and issues new orders approving higher maximum rates, and (3) a reviewing court vacates and remands the latter Commission orders on the ground that they were inadequately supported or justified. In the proceedings below, the United States Court of Appeals for the District of Columbia Circuit held that its decision vacating and remanding certain Commission orders had "revived" the earlier Commission order, and that tariff rates filed pursuant to the vacated orders were therefore "unlawful"—in effect requiring that the rates contained in the filed tariffs be rolled back to the level prescribed by the earlier order.

The question presented is whether the United States Court of Appeals for the District of Columbia Circuit, having set aside the Commission's rate order, can declare the existing tariff rate "unlawful," and thereby determine the rate which may be charged by a railroad pending the Commission's decision on remand, on the theory that an earlier Commission rate order had been "revived."

RULE 28.1 STATEMENT

The corporate families of Burlington Northern Inc. and Southern Pacific Transportation Company, including their parents, affiliates and subsidiaries, are listed in the attached charts. Because of a recent reorganization, the railroad operations formerly conducted by petitioner Burlington Northern Inc. are now conducted by its subsidiary, Burlington Northern Railroad Company.

BURLINGTON NORTHERN INC.
BURLINGTON NORTHERN RAILROAD COMPANY
BN TIMBERLANDS INC.
MINERAL CO.
THE BELT RAILWAY COMPANY OF CHICAGO (7.69%)
BN TRANSPORT INC.
BNT Terminals, Inc.
BNL DEVELOPMENT CORPORATION
BURLINGTON EQUIPMENT COMPANY
BURLINGTON NORTHERN AIR FREIGHT INC.
Burlington Northern Air Freight (Aust.) Pty. Limited (99.99%)
Burlington Northern Air Freight (U.K.) Limited
BURLINGTON NORTHERN DOCK CORPORATION
Burlington Northern Customs Brokerage Inc.
BURLINGTON NORTHERN (MANITOBA) LIMITED
Burlington Northern International Services Inc.
BURLINGTON NORTHERN (OREGON-WASHINGTON) INC.
Burlington Northern Ocean Forwarding Company
BUTTE PIPE LINE COMPANY (10%)
CAMAS PRAIRIE RAILROAD COMPANY (50%)
CHICAGO UNION STATION COMPANY (25%)
CLARKLAND, INC.
CLARKLAND ROYALTY, INC.
THE COLORADO AND SOUTHERN RAILWAY COMPANY (68.92%)
The Pueblo Union Depot and Railroad Company (25%)
Fort Worth and Denver Railway Company (99.98%)
Houston Belt & Terminal Railway Company (12.5%)
Galveston Terminal Railway Company (50%)
DAVENPORT, ROCK ISLAND AND NORTH WESTERN RAILWAY COMPANY (50%)
DENVER UNION TERMINAL RAILWAY COMPANY (BN owns 16.67% – C & S owns 16.67%)
FRISCO TRANSPORTATION COMPANY
GLACIER PARK COMPANY
Burlington Northern Automotive Inc.
Dreyer Bros. Inc.
Royal Logging Co.
Saxony Corporation
Western Fruit Express Company (2.86%)
IOWA TRANSFER RAILWAY COMPANY (25%)
KANSAS CITY TERMINAL RAILWAY COMPANY (16.6%)
KEOKUK UNION DEPOT COMPANY (40%)
THE LAKE SUPERIOR TERMINAL AND TRANSFER RAILWAY COMPANY (66.67%)
LONGVIEW SWITCHING COMPANY (33.33%)
MILESTONE PETROLEUM INC.
MINNESOTA TRANSFER RAILWAY COMPANY (33.33%)
NEW MEXICO AND ARIZONA LAND COMPANY (50%)
NZ Development Corporation
NZ Properties, Inc.
908 OLIVE CORPORATION
NORTHERN RESOURCES, INC.
NORTHERN ROCKIES PIPE LINE CO.
PADUCAH & ILLINOIS RAILROAD COMPANY (33.33%)
PLUM CREEK INC.
Arden Lumber Company, Inc.
Douglas Transportation Company
Kaneo Lumber Co., Inc.
PORTAL PIPE LINE COMPANY (50%)
PORTLAND TERMINAL RAILROAD COMPANY (40%)
THE SAINT PAUL UNION DEPOT COMPANY (40.2%)
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS (12.5%)
TRAILER TRAIN COMPANY (8.7%)
WALLA WALLA VALLEY RAILWAY COMPANY
WESTERN FRUIT EXPRESS COMPANY (97.14%)
WICHITA UNION TERMINAL RAILWAY COMPANY (33.3%)
WINONA BRIDGE RAILWAY COMPANY (66.67%)
9-2-81

PARENT COMPANY, SUBSIDIARIES AND AFFILIATES OF SOUTHERN PACIFIC TRANSPORTATION COMPANY AND ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

Bankers Leasing Corporation
Asociados Internacionales Del Pacifico
BLC Corporation
Chattel Leases, Inc.
Commetro Leasing, Inc.
Commonwealth Control, Inc.
The Commonwealth Plan, Inc.
The Commonwealth Plan of Puerto Rico, Inc.
The Commonwealth System, Inc.
Commonwealth Plan Leasing, Inc.
Financial Leasing Corporation
Lease Capital, Inc.
The Midwest Commonwealth Plan, Inc.
The Pacific Plan, Inc.
The Worcester Plan, Inc.
Bravo Oil Company
One Market Street Properties, Inc.
Pacific Petroleum Pipe Lines, Inc.
San Diego Pipeline Company
Southern Pacific Communications Company
Video Microwave, Inc.
Southern Pacific Development Company
Golden Empire Investment Corporation
Santa Barbara—Cabrillo Corporation
American Communities—Santa Barbara, Inc.
Southern Pacific Industrial Development Company
Southern Pacific Land Company
Geoproducts Corporation
Nevazona Corporation
Southern Pacific Pipe Lines, Inc.
Black Mesa Pipeline, Inc.
Mescalero Pipeline, Inc.
SPPLITT, Ltd.
Ingenieria Y Desarrollo Del Pacifico, Sa De Cv.
Southern Pacific Transportation Company
Sunset Communications Company
Southern Pacific Communications Services Company
Southern Pacific Distributed Message Systems Company
Southern Pacific Telecommunications Processing Company
Transportation Microwave Corp.
Sunset Insurance Company
Tops On-Line Services, Inc.
Evergreen Leasing Corporation
Holton Inter-Urban Railway Co.
Los Angeles Union Terminal, Inc.
Northwestern Pacific Railroad Co.
Petaluma and Santa Rosa Railroad Co.
Pacific Fruit Express Company
Pacific Motor Transport Company
Pacific Motor Trucking Company
Louis Heller, Incorporated
St. Louis Southwestern Railway Co.
Dallas Terminal Railway and Union Depot Co.
Glascar, Inc.
Main Street Warehouse Company
St. Louis Southwestern Railway Company of Texas
The Southwestern Town Lot Corp.
Southwestern Transportation Co.
The Alton & Southern Railway Co.
Southern Illinois and Missouri Bridge Co.
Arkansas & Memphis Railway Bridge Terminal Company
Trailer Train Company
Kansas City Terminal Railway Co.
Terminal Rail Company of Texas and Louisiana
Southern Pacific Warehouse Company
Visalia Electric Railroad Company
The Ogden Union Railway & Depot Co.
Portland Traction Company
Sunset Railway Company
Central California Traction Co.
Portland Terminal Railroad Co.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Railroad Ratemaking Under The Interstate Commerce Act	2
B. The *San Antonio* Rate Proceedings	4
C. The D.C. Circuit's Decision On The Railroads' Petition For Clarification Of Mandate	8
ARGUMENT	10
I. The Court Of Appeals Exceeded The Scope Of Its Authority By Declaring The Filed Tariff Rates Unlawful	11
A. The Decision Of The Court Of Appeals Conflicts With This Court's Decision In *Consolidated Rail*	11
B. The Decision Of The Court Of Appeals Conflicts With The Decision Of The Fifth Circuit In *San Antonio* v. *Burlington Northern Inc.*	16
II. The Decision Of The Court Of Appeals Conflicts With The Filed Rate Doctrine	17
III. The Court Of Appeals' Decision Will Undermine The Ratemaking Scheme	21
CONCLUSION	25

TABLE OF AUTHORITIES

	Page
CASES	
American Broadcasting Cos. v. *FCC*, 643 F.2d 818 (D.C. Cir. 1980)	22
Arkansas Louisiana Gas Co. v. *Hall*, ___ U.S. ___, 101 S.Ct. 2925 (1981)	10, 18, 20-22
Arrow Transp. Co. v. *Southern Ry. Co.*, 372 U.S. 658 (1963)	3, 12
Atchison, T. & S.F. Ry. Co. v. *Wichita Board of Trade*, 412 U.S. 800 (1973)	6, 11, 12, 14, 15
Burlington Northern Inc. v. *United States*, 555 F.2d 637 (8th Cir. 1977)	5
City of Cleveland v. *FPC*, 525 F.2d 845 (D.C. Cir. 1976)	21
Consolidated Rail Corp. v. *National Association of Recycling Industries, Inc.*, ___ U.S. ___, 101 S.Ct. 775 (1981)	3, 9-16, 25
Davis v. *Portland Seed Co.*, 264 U.S. 403 (1924)	20
FPC v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956)	22
FTC v. *Minneapolis-Honeywell Co.*, 344 U.S. 206 (1952)	2
Genstar Chemical Ltd. v. *ICC*, No. 80-1170 (D.C. Cir. September 25, 1981)	20
Lowden v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939)	3, 18, 19
National Association of Recycling Industries, Inc. v. *ICC*, 627 F.2d 1328 (D.C. Cir. 1980)	12
Pennsylvania Ry. Co. v. *International Coal Mining Co.*, 230 U.S. 184 (1913)	18, 19
Pittsburgh, Cincinnati, Chicago, St. Louis Ry. Co. v. *Fink*, 250 U.S. 577 (1919)	20

	Page
San Antonio, Texas v. *Burlington Northern Inc.*, 650 F.2d 49, *clarified*, 652 F.2d 422 (5th Cir. 1981)	8, 17, 24
San Antonio, Texas v. *United States*, 631 F.2d 831 (D.C. Cir. 1980)	*passim*
San Antonio, Texas v. *United States*, 655 F.2d 1341 (D.C. Cir. 1981)	*passim*
Southern Ry. Co. v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979)	3
United States v. *SCRAP*, 412 U.S. 669 (1973)	3, 4, 12-14
ICC PROCEEDINGS	
San Antonio, Texas v. *Burlington Northern Inc.*, 355 I.C.C. 405 (1976) (*San Antonio I*)	*passim*
San Antonio, Texas v. *Burlington Northern Inc.*, 359 I.C.C. 1 (1978) (*San Antonio II*)	*passim*
San Antonio, Texas v. *Burlington Northern Inc.*, 361 I.C.C. 482 (1979) (*San Antonio III*)	*passim*
San Antonio, Texas v. *Burlington Northern Inc.*, 364 I.C.C. 887 (1981)	2, 8, 9, 14
STATUTES	
Interstate Commerce Act:	
49 U.S.C. §10704(a)(1)	4
49 U.S.C. §10705(b)(3)	4
49 U.S.C. §10707	3, 4
49 U.S.C. §10761(a)	2, 18, 19
49 U.S.C. §11701	3
49 U.S.C. §11902	19
49 U.S.C. §11903	19
Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1985:	
§2	11
§3	11
Judicial Code, 28 U.S.C. §2349(a)	2, 16

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Burlington Northern Inc. and Southern Pacific Transportation Company (the "railroads"), hereby request certiorari to review, and summary reversal of, the June 30, 1981 decision of the United States Court of Appeals for the District of Columbia Circuit holding that a 1980 decision of that court had "revived" a 1976 rate order of the Interstate Commerce Commission, and that filed tariff rates inconsistent with the 1976 order were therefore "unlawful."

OPINIONS BELOW

The June 30, 1981, decision of the Court of Appeals, which is reported as *San Antonio, Texas* v. *United States*, 655 F.2d 1341 (D.C. Cir. 1981), appears as Appendix A. The earlier related decision of the Court of Appeals is reported as *San Antonio, Texas* v. *United States*, 631 F.2d 831 (D.C. Cir. 1980), and appears as Appendix B. The decisions of the Interstate Commerce Com-

mission which were reviewed by the Court of Appeals in its decision of June 9, 1980 appear as Appendices C and D, and the 1976 Commission decision which the court held had been "revived" appears as Appendix E. The Commission's April 7, 1981 order (dated April 3, 1981) directing San Antonio to pay the filed tariff rate pending completion of the reopened Commission proceedings appears as Appendix F.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1981. The court denied a timely petition for rehearing with suggestion for rehearing *en banc* on August 26, 1981. See Appendix G. Petitioners seek certiorari only from the judgment entered on June 30, 1981, and do not ask this Court to review any of the issues resolved by the Court of Appeals in its decision of June 9, 1980. See *FTC* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211 (1952). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The statutes involved are the Interstate Commerce Act, 49 U.S.C. §10101 *et seq.*, and the Judicial Code, 28 U.S.C. §2349(a). Pertinent provisions of these statutes are set forth in the statutory appendix.

STATEMENT OF THE CASE

A. Railroad Ratemaking Under the Interstate Commerce Act

Under the ratemaking scheme established by the Interstate Commerce Act, railroads may charge only those rates which have been filed in tariffs with the Interstate Commerce Commission.[1] When a railroad files a tariff containing a revised rate, the Commission may exercise its discretion to suspend that rate pending an investigation; however, if the rate is not suspended, it becomes

[1] 49 U.S.C.A. §10761(a) (West Supp. 1981).

effective by operation of law, and remains in effect until the Commission orders it changed.[2] Any deviation from this filed tariff rate—either on the part of the railroad in the form of a voluntary rebate, or on the part of the shipper in the form of an involuntary rebate—is strictly prohibited.[3]

Because of the complexity of railroad rates and the need to preserve uniformity, Congress has delegated to one expert body—the Interstate Commerce Commission—the exclusive authority to determine the lawfulness of filed rates. This Court has held that, until the Commission renders a final determination that a filed rate is unlawful, courts have no jurisdiction to enjoin a rate increase, *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658 (1963); to revoke a rate increase, *Consolidated Rail Corp.* v. *National Ass'n of Recycling Industries*, ___ U.S. ___, 101 S.Ct. 775 (1981); or to order the Commission to suspend a rate increase, *United States* v. *SCRAP*, 412 U.S. 669, 690-91 (1973). As the Court stated just last Term in *Consolidated Rail, supra*, 101 S.Ct. at 777: "The authority to determine when any particular rate should be implemented is a matter which Congress has placed squarely in the hands of the Commission."

The Act confers a wide range of powers upon the Commission to protect shippers from filed rates that the Commission ultimately determines are unlawfully high. A shipper may file a complaint with the Commission at any time alleging that a tariff rate is unreasonably high or otherwise in violation of the Act, or the Commission may institute an investigation on its own initiative.[4] If the Commission determines in such a proceeding that the filed rate is

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[2]49 U.S.C.A. §§10707(b) & (c) (West Supp. 1981).

[3]See, *e.g.*, *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520-21 (1939).

[4]49 U.S.C.A. §11701 (West Supp. 1981); see *Southern Ry. Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 454 (1979).

unlawful, it may prescribe a different rate for the future,[5] and award the shipper reparations as to the past.[6]

In contrast, the Commission is not empowered to award reparations to a carrier that is prevented from collecting a rate later deemed to have been reasonable. If a railroad is ordered to reduce a rate, and the maximum lawful rate is ultimately set at a higher level, there is no way under the Act for the railroad to recover its lost revenues.[7] In such a case the railroad's loss will be irreparable.

B. The *San Antonio* Rate Proceedings

The instant case involves a longstanding controversy over the maximum lawful rate for the transportation of approximately 3 million tons of coal per year in unit train service from Cordero Junction, Wyoming, to the electric generating station owned by the City of San Antonio, Texas, at Elmendorf, Texas.

The first round in this controversy occurred in 1976, shortly before the unit train service was scheduled to begin. The Commission, in a decision now known as *San Antonio I*,[8] prescribed an interim rate for the movement. On review, the United States Court of Appeals for the Eighth Circuit sustained the Commission order, emphasizing that "[t]he rate is a temporary

[5]49 U.S.C.A. § 10704(a)(1) (West Supp. 1981).

[6]49 U.S.C.A. § 11705(b)(3) (West Supp. 1981).

[7]See *United States* v. *SCRAP*, 412 U.S. 669, 697 (1973).

In the past, carriers have frequently been barred from recovering lost revenue by a *Commission* order suspending a rate increase pursuant to 49 U.S.C. §10707(c)(1). In 1980, however, Congress amended the suspension section of the Interstate Commerce Act by adding a "reverse refund" provision, which allows carriers to recover the difference between the suspended rate and the rate actually collected if the Commission eventually determines that the suspended rate was reasonable. 49 U.S.C. §10707(d)(2). No such "reverse refund" was provided, however, for other types of orders, including *court* orders, requiring a rate reduction.

[8]*San Antonio, Texas* v. *Burlington Northern Inc.*, 355 I.C.C. 405 (1976), attached as Appendix E.

one, developed to meet an emergency situation." *Burlington Northern Inc.* v. *United States*, 555 F.2d 637, 648 (8th Cir. 1977).

Upon petition by the railroads, the Commission reopened the proceedings and ultimately issued two further orders, *San Antonio II*[9] and *San Antonio III*.[10] In *San Antonio II*, decided in 1978, the Commission determined that the *San Antonio I* rate level was too low, and that "modification of the previously prescribed rate" was warranted, based on evidence of rate comparisons, costs, carrier revenue needs, and the public interest. 359 I.C.C. at 4-14 (App. D-4-14). The Commission then prescribed a new maximum rate ceiling. In *San Antonio III*, decided in 1979, the *San Antonio II* order was in turn modified, and the Commission prescribed a slightly higher rate ceiling.

The railroads filed petitions for review challenging the *San Antonio II* and *San Antonio III* decisions in the United States Court of Appeals for the District of Columbia Circuit, contending that the new rate ceilings were too low. San Antonio also petitioned for review, contending that the new rate ceilings were too high.

In a decision entered June 9, 1980, the Court of Appeals set aside the Commission's decisions and orders in *San Antonio II* and *San Antonio III*. *San Antonio* v. *United States*, 631 F.2d 831 (D.C. Cir. 1980). The court did not question the Commission's conclusion, announced in *San Antonio II*, that the *San Antonio I* rate prescription should be modified. Rather, the court simply held that the new maximum rate ceilings established in *San Antonio II* and *San Antonio III* were "arbitrary and capricious" and without "defensible rationale." *Id.* at 851 (App. B-39-40). Without suggesting that the new rate ceilings were either too high or

[9]*San Antonio, Texas* v. *Burlington Northern Inc.*, 359 I.C.C. 1 (1978), attached as Appendix D.

[10]*San Antonio, Texas* v. *Burlington Northern Inc.*, 361 I.C.C. 482 (1979), attached as Appendix C.

too low, the court vacated "the orders before us" and remanded to the Commission "for proceedings not inconsistent with this opinion." *Id.* at 853 (App. B-43).

After the Court of Appeals denied a petition for rehearing and issued its mandate on July 24, 1980, a controversy developed over the effect of the court's decision on the filed tariff rate, which had been set by the railroads at the maximum level permitted by the Commission in *San Antonio III*. The railroads, relying on this Court's decision in *Atchison, T. & S.F. Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 817-826 (1973), concluded that the Court of Appeals' decision had set aside the Commission's *orders* in *San Antonio II* and *San Antonio III*, but did not disturb the tariff *rates* filed by the railroads in response to those orders. In the railroads' view, therefore, the filed rate was still in effect and would remain in effect unless and until the Commission, on remand, determined that the *San Antonio III* rate was unlawfully high and ordered the railroads to file a reduced rate. Under this interpretation, if the Commission ultimately found that the *San Antonio III* rate was too high, San Antonio would be fully protected by the availability of reparations.

San Antonio, on the other hand, argued that since the Court of Appeals had vacated the Commission's orders in *San Antonio II* and *San Antonio III*, and the order in *San Antonio II* had modified the order in *San Antonio I*, the effect of the Court of Appeal's decision was to "revive" the temporary 1976 rate prescription in *San Antonio I*. Relying upon its "revival" theory, and without filing a complaint with the Commission or seeking a formal order requiring the railroads to reduce their tariff to the *San Antonio I* rate, San Antonio unilaterally began remitting payment to the railroads at the *San Antonio I* level.[11]

[11] For convenience, this petition refers to the "*San Antonio I* rate," the "*San Antonio II* rate," and the "*San Antonio III* rate," although throughout this time general rate increases (which are not at issue here) have been permitted to take effect by the Commission, thereby increasing these rates.

If San Antonio's interpretation of the Court of Appeals' decision were correct, the resulting rate rollback would create a tremendous windfall, since no one at that time (not even San Antonio) contended that the *San Antonio I* rate (which was based on 1974 costs updated to 1976) represented the maximum reasonable rate *as of 1980.*[12] Moreover, such a windfall would cause irreparable injury to the railroads, because the railroads would have no way under the Interstate Commerce Act to recover the difference between the *San Antonio I* rate and whatever rate the Commission ultimately determined was reasonable.

By way of resolving the controversy, the Commission, initially agreeing with San Antonio that the *San Antonio I* order had been revived, suggested that the railroads file a new tariff. The railroads followed this suggestion, and filed a new tariff at the *San Antonio III* level, together with a justification statement. San Antonio asked the Commission to suspend this tariff, contending that the Commission could not set aside the "revived" *San Antonio I* decision without a full hearing. The Commission, however, declined to suspend the tariff, and the tariff took effect on December 31, 1980.

Despite this unambiguous action by the Commission, San Antonio continued to remit payments to the railroads at the *San Antonio I* level, first on the pretext that the Commission's decision not to suspend the new tariff was unlawful (because of the Commission's failure to afford San Antonio a "full hearing"), and later under the color of a preliminary injunction secured from the United States District Court for the Western District of Texas (San Antonio Division).

Finally, on April 7, 1981, the Commission served an order (dated April 3, 1981) directing San Antonio to pay the filed tariff

[12]In a pleading submitted to the Commission in December, 1980 San Antonio stated that it would "not contest" a rate of $20.00 per ton. *Petition In The Alternative*, I.C.C. Docket No. 36180, December 18, 1980, at 20. The *San Antonio I* rate was at that time $15.83 per ton.

rate (at the *San Antonio III* level) pending the conclusion of reopened proceedings in response to the Court of Appeals' remand. *San Antonio, Texas* v. *Burlington Northern Inc.*, 364 I.C.C. 887 (1981).[13] The United States Court of Appeals for the Fifth Circuit subsequently declined to stay this order, which became effective on May 7, 1981. *San Antonio, Texas* v. *Burlington Northern Inc.*, 650 F.2d 49, *clarified*, 652 F.2d 422 (5th Cir. 1981). The Fifth Circuit also reversed the preliminary injunction issued by the United States District Court for the Western District of Texas (San Antonio Division), holding that the district court had no jurisdiction to enjoin railroads from collecting the filed tariff rate. *Id.*

Thus, as of May 7, 1981 the controversy was resolved as to the rate San Antonio would be required to remit in the immediate future. Left unresolved, however, was whether San Antonio had acted properly in taking matters into its own hands and refusing to pay the filed tariff rate from July 24, 1980 to May 7, 1981. The difference between the filed tariff rate and the payments remitted by San Antonio during this period is $19,887,179.96.

C. The D.C. Circuit's Decision On The Railroads' Petition For Clarification Of Mandate

In the meantime, on November 22, 1980, the railroads had filed a petition for clarification of mandate with the United States Court of Appeals for the District of Columbia Circuit, seeking a declaration that the court's June 9, 1980, decision had *not* revived the Commission's order in *San Antonio I*.

In response to the railroads' petition, the Commission initially took the position that the June 9, 1980 decision, as written, would have had the effect of reviving *San Antonio I*. However, the Commission criticized this result, noting that it would produce a "serious inequity" by reinstituting a rate "that is several years out of

[13] Attached as Appendix F.

date," thereby "depriv[ing] the railroads of revenues which they cannot regain, since the Commission may not order shippers to retrospectively pay higher rates. . . ." Accordingly, the Commission requested that the Court of Appeals amend its decision by stating that no such result was ever intended.

Later, after this Court issued its decision in *Consolidated Rail Corp.* v. *National Ass'n of Recycling Industries, Inc.*, ____ U.S. ____, 101 S.Ct. 775 (1981), the Commission changed its position. In its April 7 order directing San Antonio to resume paying the filed tariff rate, the Commission stated it now believed that "under the principles of *Wichita Board of Trade* and *Consolidated Rail*," the June 9, 1980 decision, even as written, did *not* have effect of reviving *San Antonio I. San Antonio, Texas* v. *Burlington Northern Inc.*, 364 I.C.C. 887, 892 n.3 (1981) (App. F-6). The Commission added (*id.*):

> "Moreover, we believe the general teaching of those cases—that a reviewing court interferes with a matter entrusted to the Commission's jurisdiction by, in effect, prescribing rates pending a Commission decision on remand—should lead the court to clarify its mandate as not restoring *San Antonio I.*"

On June 30, 1981, the Court of Appeals entered the decision here under review. *San Antonio, Texas* v. *United States*, 655 F.2d 1341 (D.C. Cir. 1981). The court acknowledged that under *Consolidated Rail, supra*, and *Wichita Board of Trade, supra*, it had no authority to "determine interim transportation policy pending further ICC action after a decision of this court vacating an ICC order." 655 F.2d at 1343 (App. A-3). Nevertheless, the court concluded that it did have authority, indeed, that it was *compelled*, to "restore the *status quo ante*" as it existed prior to the Commission's decisions in *San Antonio II* and *San Antonio III*. *Id.* at 1344 (App. A-4). Since the "*status quo ante*" prior to issuance of *San Antonio II* and *San Antonio III* was, in the court's view, the Com-

[14]Response of Interstate Commerce Commission to Petition for Clarification of Mandate, December 24, 1980, at 8.

mission's decision in *San Antonio I*, the court held that *San Antonio I* had been "revived," and that "[t]ariffs in excess of it have been therefore unlawful." *Id.* In effect, the court required the railroads to roll back the filed rate to the *San Antonio I* level pending further action by the Commission.

The Court of Appeals obliquely acknowledged the inequity of a rollback in rates to the level set by the Commission on a "temporary" basis in 1976. The court was of the view, however, that the only avenue of relief for a carrier which finds itself subject to an outdated "revived" order was to petition the Commission for "[s]uitable interim action." *Id.* at 1344-45 (App. A-6). The court did not explain what form of "interim" relief was in fact available to the railroads.

ARGUMENT

In the order under review, the Court of Appeals has declared unlawful published tariff rates which have never been declared unlawful by the Interstate Commerce Commission. This action is directly contrary to this Court's recent decision in *Consolidated Rail Corp.* v. *National Ass'n of Recycling Industries, Inc.*, ___ U.S. ___, 101 S.Ct. 775 (1981), and to the fundamental principle that only the Commission, not the courts acting under the guise of judicial review, may prescribe the level of rates to be charged by common carriers.

In addition, the lower court, by declaring duly filed tariff rates "unlawful," has violated the "filed rate doctrine." As this Court explained last Term, the filed rate doctrine requires not just carriers and shippers, but also the courts, to adhere to the rates established in published tariffs filed with the Commission. *Arkansas Louisiana Gas Co.* v. *Hall*, ___ U.S. ___, 101 S.Ct. 2925 (1981).

Finally, the decision below undermines the ratemaking scheme established by the Act. By requiring a rollback in rates whenever a reviewing court overturns a Commission order modifying a

prior order, the ruling will seriously interfere with the efforts of carriers to recover rising costs during periods of inflation, a particularly unfortunate result in light of Congress' recent recognition that railroads are earning inadequate revenues, and its passage of a comprehensive Act intended to alleviate this problem.[15]

The Court of Appeals' decision is so clearly contrary to authority, and will have such a disruptive impact on the ratemaking scheme, that this Court should, as it has in a closely similar case, vacate the lower court's order summarily. *Consolidated Rail, supra*.

I. THE COURT OF APPEALS EXCEEDED THE SCOPE OF ITS AUTHORITY BY DECLARING THE FILED TARIFF RATES UNLAWFUL

A. The Decision Of The Court Of Appeals Conflicts With This Court's Decision In *Consolidated Rail*

The suggestion that a reviewing court retains some power to affect the level of rates that may be charged pending reconsideration of a rate order by the Interstate Commerce Commission was squarely rejected by this Court last Term in *Consolidated Rail Corp.* v. *National Ass'n of Recycling Industries, Inc.*, ___ U.S. ___, 101 S.Ct. 775 (1981). Building upon its earlier decision in *Atchison, T. & S.F. Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973), this Court held unanimously that while a reviewing

[15]Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. In its findings accompanying the Act, Congress specifically found that "earnings in the railroad industry are the lowest of any transportation mode and are insufficient to generate funds for necessary capital improvements," and that the railroads' continued "failure to achieve increased earnings" would "result in either further deterioration of the rail system or the necessity for additional Federal subsidy." Congressional Declaration of Findings Accompanying the Act, Pub. L. No. 96-448, Section 2. For these reasons Congress passed a comprehensive Act which would, in its view, "provide for the restoration, maintenance, and improvement of the physical facilities and financial stability of the rail system of the United States." Congressional Statement of Purpose and Goals Accompanying the Act, Pub. L. No. 96-448, Section 3.

court may set aside a Commission rate order as lacking in support, such a court is "without authority" to go further and either revoke or suspend increased rates filed pursuant to such an order. 101 S.Ct. at 777.

In *Consolidated Rail*, the Commission had prescribed a maximum rate for recyclable materials equal to 180% of variable costs. The United States Court of Appeals for the District of Columbia Circuit, in an opinion by Judge Wilkey, vacated and remanded this order on the grounds that the Commission failed to offer sufficient justification for its choice of the 180% figure. *National Ass'n of Recycling Industries, Inc.* v. *ICC*, 627 F.2d 1328 (D.C. Cir. 1980). In a subsequent order clarifying its decision, the court further ruled that any increased rates filed by the railroads pursuant to the 180% ceiling "*must be revoked* until such time as the ICC issues a new determination of what rates are reasonable." *Id.* at 1340 (emphasis supplied).

This Court summarily reversed that portion of the Court of Appeals' decision revoking the higher rates pending further review. Relying on *Wichita Board of Trade*, and on earlier decisions holding that courts have no jurisdiction to enjoin rate increases pending a final Commission determination of lawfulness,[16] the Court held: "The authority to determine when any particular rate should be implemented is a matter which Congress has placed squarely in the hands of the Commission." 101 S.Ct. at 777. The Court elaborated:

> "While the Court of Appeals was not without power to order further proceedings to determine the propriety of the 180% ratio standard, the court stepped beyond the proper exercise of its power when it revoked rates implemented under the standard and enjoined any further increases toward the 180% level. The basis for these remedies was the

[16] *See Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, 662-672 (1963); *United States* v. *SCRAP*, 412 U.S. 669, 690-698 (1973).

court's conclusion that the Commission had failed to adequately support the choice of the 180% figure. That standard was not rejected outright; the court's opinion leaves open the possibility that the 180% ratio may eventually prevail.

Under the above circumstances, there is no basis in our prior decisions for the revocation order or for the injunction against further increases." *Id.*

In the decision below, the Court of Appeals, again in an opinion by Judge Wilkey, recognized that *Consolidated Rail* was controlling authority, and correctly stated that, under the ruling in that case, "reviewing courts do not have the authority to determine interim policy pending new Commission action after the vacation of a Commission order." 655 F.2d at 1344 (App. A-5). However, by a contortion of logic, the lower court concluded that under *Consolidated Rail* it was *compelled* to declare the existing tariff rates unlawful, in effect requiring a rate rollback to the level of *San Antonio I*.

The Court of Appeals distorted the meaning of *Consolidated Rail*. Here, as in that case, the Court of Appeals did *not* "reject outright" the Commission's order in *San Antonio III*. On the contrary, the Court of Appeals, in its decision of June 9, 1980, approved the Commission handling of several cost issues, disapproved two others, and set aside the Commission's rate ceiling—*not* because the rate ceiling was either too high or too low, but because it was without "defensible rationale." 631 F.2d at 851 (App. B-39). In short, as in *Consolidated Rail*, the lower court's decision here clearly left open "the possibility that the [*San Antonio III* rate] may ultimately prevail." ___ U.S. ___, 101 S. Ct. at 777. Under these circumstances, *Consolidated Rail* indicates that the Court of Appeals was "without authority" to require a rate rollback to the *San Antonio I* level."

"San Antonio argued in the court below that *Consolidated Rail* does not govern this case because the rates filed by the railroads after the Commission's decisions in *San Antonio II* and *San Antonio III* were "agency-made" rates rather than "carrier-made" rates. See *United*

(Footnote continued on following page.)

The key to the lower court's bizarre conclusion lies in its statement that, under *Consolidated Rail*, the reviewing court's function is "to restore the situation to the *status quo* before the vacated orders were issued." 655 F.2d at 1343 (App. A-2). One searches in vain for any such description of the role of the reviewing court in *Consolidated Rail*. On the contrary, *Consolidated Rail* is grounded on the fundamental principle that it is the Commission, not the reviewing court, which has exclusive authority to set maximum rate levels. For a reviewing court to revoke or suspend rate increases pending further consideration by the Commission would directly interfere with this authority, especially when the reviewing court has done no more than remand for further explanation. As this Court stated in *Consolidated Rail*, " '[w]hen a case is remanded on the ground that the agency's policies are unclear, an injunction ordinarily interferes with the primary jurisdiction of the Commission.' " 101 S.Ct. at 777, *quoting Wichita Board of Trade, supra*, 412 U.S. at 822. In short, the

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(Footnote continued from preceding page.)

States v. *SCRAP*, 412 U.S. 669, 693 n. 17 (1973). The lower court did not reach this contention. However, the Commission has ruled squarely that the *San Antonio II* and *San Antonio III* rates were not "agency-made" rates. *San Antonio, Texas* v. *Burlington Northern Inc.*, 364 I.C.C. 887, 892 n. 3 (1981). The Commission's interpretation of its own order is clearly supported by the language of *San Antonio II*, in which the Commission stated:

> "We find that a rate not exceeding $16.12 per ton would be lawful on the basis of the existing record, and our prior finding is modified accordingly. This finding only indicates what constitutes a maximum reasonable rate level on this traffic. It is not in any sense a requirement that the railroads increase their rates on this traffic to any particular level." 359 I.C.C. at 18 (App. D-18).

In other words, the Commission's orders in *San Antonio II* and *San Antonio III* established maximum rate ceilings, and the rates filed by the carriers within those ceilings were therefore "carrier-made" rates. This was precisely the situation presented to the Court in *Consolidated Rail*, in which Commission established rate ceilings equal to 180% of variable costs and the carriers then filed tariffs containing rates up to the 180% level.

function of the reviewing court under *Consolidated Rail* is to preserve the Commission's exclusive authority to establish rate policy, not to restore whatever the court considers the "status quo."

To be sure, in both *Consolidated Rail* and *Wichita Board of Trade* the result which preserved the Commission's exclusive ratemaking authority also preserved the "status quo" as it existed prior to issuance of the Commission's orders. In the present case, however, the decision to "restore the *status quo*" directly interferes with the Commission's exclusive ratemaking function. The *San Antonio I* order represents the Commission's interim determination of the maximum reasonable rate *as of 1976*. The Commission has never ruled, or even suggested, that the *San Antonio I* rate reflects the just and reasonable maximum for the period from *1980* to *1981*. Thus, in restoring the "*status quo*" as it existed from 1976 to 1978, the lower court substituted its judgment of ratemaking policy for that of the Commission.

In this case, the only way for the court to preserve the Commission's exclusive authority to establish rate policy was to conclude that the railroads were *not* required to roll back their rates to the level of *San Antonio I*. By allowing the railroads to continue to collect the filed rate, the court would leave intact the Commission's power to make retroactive adjustments in the rate level. Thus, if the Commission eventually found that the filed rate was too high, San Antonio would be eligible for an award of reparations. In contrast, if the railroads were required by *court order* to roll back their rates to the level of *San Antonio I*, and the Commission eventually found that the *San Antonio I* rate was not a maximum reasonable rate, the Commission would have no way retroactively to order San Antonio to pay the higher rate. The court would have thus usurped the Commission's power to establish rate policy.

There is no special difficulty in interpreting the Court of Appeals decision of June 9, 1980 in a manner consistent with *Con-*

solidated Rail. The statute which establishes the jurisdiction of the Court of Appeals over Commission rate orders, 28 U.S.C. §2349(a), provides that the court may enter a judgment "determining the validity of, and enjoining, setting aside, or suspending, *in whole or in part*, the order of the agency." (Emphasis supplied.) In its decision of June 9, 1980, the Court of Appeals decided only that the Commission's new rate ceilings in *San Antonio II* and *San Antonio III* were arbitrary and capricious and "indefensible." No one seriously argued, and the Court of Appeals did *not* address or decide, that the Commission had acted improperly in concluding that the "temporary" *San Antonio I* order should be modified. Thus, in its decision of June 9, 1980 the court actually set aside the orders in *San Antonio II* and *San Antonio III* only "in part." It set aside the Commission's new rate ceilings, but it did not set aside the Commission's decision to lift its prior rate prescription order in *San Antonio I.*[10]

When interpreted in this manner, the effect of the June 9, 1980 decision was to leave *no* Commission rate prescription or ceiling in effect for the San Antonio movement. This, of course, is the same situation which resulted under this Court's decisions in *Consolidated Rail* and *Wichita Board of Trade.* Pending the issuance of a further rate order by the Commission on remand, the shipper is protected by the Commission's power to suspend or investigate any new rate initiatives by the railroads, and to award reparations. Most importantly, such an interpretation—and only such an interpretation—preserves the authority of the Commission to determine rate policy pending reconsideration, and avoids a result which imposes irreparable injury on the railroads.

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[10]Because the June 9, 1980 decision can be interpreted as setting aside *San Antonio II* only "in part," the Court of Appeals erred in stating that it could avoid the revival of *San Antonio I* only by "strik[ing] down the *San Antonio I* order, which was still outstanding and *not* before us for review." 655 F.2d at 1344 (App. A-6).

B. The Decision Of The Court Of Appeals Conflicts With The Decision Of The Fifth Circuit In *San Antonio* v. *Burlington Northern Inc.*

The Court of Appeals' ruling not only conflicts with this Court's decision in *Consolidated Rail*, but also with the decision of the United States Court of Appeals for the Fifth Circuit in *San Antonio, Texas* v. *Burlington Northern Inc.*, 650 F.2d 49, *clarified*, 652 F.2d 422 (5th Cir. 1981).

In the decision below, the Court of Appeals concluded that it had authority, based on the determination that the *San Antonio I* order had been revived, to declare the railroads' published tariff rate "unlawful," in effect requiring a rate rollback to the *San Antonio I* level.

In *San Antonio, Texas* v. *Burlington Northern Inc., supra*, however, the Fifth Circuit held on the same facts that, even assuming the *San Antonio I* order had been revived, a court would have "no jurisdiction" to order the railroads to roll back their rates to the level of *San Antonio I*. 650 F.2d at 53. Relying on this Court's decisions recognizing the Commission's exclusive authority to establish rate policy, including *Consolidated Rail*, the Fifth Circuit held:

> "When the Commission has not made a final determination, in a matter of which it has jurisdiction, that a published rate is unlawful (*whether because the rate violates a prior Commission order* or for any other reason), only the Commission can suspend the rate. It is clear in this case that the Commission has not made a final determination that the published rate of $23.05 per ton [the *San Antonio III* level] is unlawful." *Id.* (emphasis supplied).

The Fifth Circuit's holding that there is no judicial authority to establish rate policy in the face of an allegedly revived rate order thus directly conflicts with the decision below. This conflict stems from a fundamental disagreement between the circuits as to

the proper role of courts in the ICC ratemaking system. This Court should grant certiorari and endorse the Fifth Circuit's recognition that the power to prescribe rates rests exclusively with the Commission.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE FILED RATE DOCTRINE

The Court of Appeals not only exceeded its authority as defined in *Consolidated Rail*, it also violated the "filed rate doctrine." The filed rate doctrine, as this Court explained just last Term, "forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co.* v. *Hall*, ___ U.S. ___, 101 S.Ct. 2925, 2933 (1981). In the context of the Interstate Commerce Act, where the filed rate doctrine "has its origins," *id.*, it is well established that the filed rate doctrine not only forbids a carrier from charging, but also forbids a shipper from *paying*, any rate other than the one filed with the Commission. *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520-21 (1939); *Pennsylvania Ry. Co.* v. *International Coal Mining Co.*, 230 U.S. 184, 196-97 (1913).

Throughout the period in controversy in this case, the rate which appeared in the tariffs on file with the Commission was the *San Antonio III* rate. Nevertheless, beginning with shipments of coal delivered on July 24, 1980, and until May 7, 1981 (when the Commission ordered San Antonio to resume paying at the filed *San Antonio III* rate), San Antonio refused to pay the filed tariff rate, and instead remitted payments to the railroads at the lower *San Antonio I* rate level.

San Antonio's recourse to self help during this period was clearly unlawful under the Interstate Commerce Act. The Act unequivocally provides that the "carrier may not charge *or receive* a different compensation for . . . transportation or service

from the rate specified in the tariff. . . ." 49 U.S.C. §10761(a) (emphasis supplied). Indeed, the Act provides substantial civil and criminal penalties for charging or receiving amounts for transportation different from those set forth in the filed tariff. 49 U.S.C. §§11902, 11903. As this Court recognized in *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520-21 (1939):

> "Until changed, tariffs bind both carriers and shippers with the force of law. Under §6 of the Interstate Commerce Act [now §10761(a)] the carrier cannot deviate from the rate specified in the tariff for any service in connection with the transportation of property. That section forbids the carrier from giving a voluntary rebate in any shape or form. . . . *It is equally important to aid the efforts of a carrier in collecting published charges in full. Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates.*" (Emphasis supplied.)

Under the filed rate doctrine, San Antonio acted improperly in refusing to pay the full amount of the filed tariff. If San Antonio believed that the filed tariff rate was unlawful (because the rate violated the allegedly "revived" *San Antonio I* order or for any other reason), it should have filed a complaint with the Commission, asking the Commission to order the railroads to reduce their tariff, and to award reparations for any unlawful overcharges. As this Court ruled in *Pennsylvania Ry. Co.* v. *International Coal Mining Co.*, 230 U.S. 184, 197 (1913):

> "The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable, *the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former, the right to apply to the Commission for reparation.*" (Emphasis supplied.)

Despite the ready availability of this administrative remedy, San Antonio never filed a complaint with the Commission after

July 24, 1980 asking the Commission to order the railroads to reduce their tariff."

The filed rate doctrine admits of no exceptions. In *Arkansas Louisiana Gas, supra*, this Court recently reaffirmed that the filed rate doctrine requires not only carriers and shippers, but also courts, to defer to the rates contained in tariffs filed with a regulatory commission. The issue there was whether a state court could award damages for breach of a natural gas supply contract, even though the rate specified by the contract was not reflected in the rate filed with the Commission. This Court held that, under the filed rate doctrine, the state courts could not give precedence to the contract rate over the filed rate. Noting that "the courts lack authority to impose a different rate than the one approved by the Commission," ___ U.S. ___, 101 S.Ct. at 2933-34, the Court found that a damage award "amounts to nothing less than the award of a retroactive rate increase based on speculation about what the Commission might have done had it been faced with the facts of this case." *Id.*

The Court of Appeals in this case, like the Louisiana Supreme Court in *Arkansas Louisiana Gas*, violated the filed rate doctrine. Throughout the period governed by the court's order, the published tariff on file with the Commission reflected the rate established in *San Antonio III*. The Court of Appeals, however, decreed that any rate higher than the *San Antonio I* level would be

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[19]Thus, even if the Court of Appeals were correct in ruling that the *San Antonio I* order had been revived, San Antonio was not legally entitled to withhold payment at the duly-filed tariff rate. See, *e.g., Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Fink*, 250 U.S. 577, 581-582 (1919). In an action for reparations based on San Antonio's theory of "revival," the Commission would not necessarily be required to award the full difference between the tariff rate and the *San Antonio I* rate, but could take into account other factors, including its determination of rate reasonableness, in setting the amount of damages (if any). *See Davis* v. *Portland Seed Co.*, 264 U.S. 403 (1924); *Genstar Chemical Ltd.* v. *ICC*, No. 80-1170 (D.C. Cir. September 25, 1981).

"unlawful." This was nothing more than speculation about what the Commission would have done if San Antonio had filed an administrative complaint challenging the published rate—speculation which, to judge by the Commission's own statements made to the Court of Appeals, was manifestly incorrect.[20]

Moreover, by ruling that the published tariff rate was "unlawful," the Court of Appeals in effect endorsed San Antonio's unilateral decision to ignore the filed tariff rate and compute its own charges. The court thereby encouraged shippers who believe they have been charged unlawful rates to bypass the administrative procedures established by the Interstate Commerce Act, unilaterally reduce the charges they pay, and take their chances that they will be upheld in this action by a reviewing court. Such a procedure is totally contrary to the policy underlying the filed rate doctrine, which is to preserve " 'the agency's primary jurisdiction over reasonableness of rates' " and to ensure " 'that regulated companies charge only those rates of which the agency has been made cognizant.' " *Arkansas Louisiana Gas*, *supra*, 101 S.Ct. at 2933, *quoting City of Cleveland* v. *FPC*, 525 F.2d 845, 854 (D.C. Cir. 1976).

This Court should grant certiorari to reaffirm its recent holding that courts have no authority to impose rates different from the rates filed with the Commission.

III. THE COURT OF APPEALS' DECISION WILL UNDERMINE THE RATEMAKING SCHEME

The decision below not only is clearly contrary to authority, it is also, on its own terms, a serious threat to the integrity of the ratemaking scheme established by the Interstate Commerce Act. In a period of persistent inflation such as the present, the Commission will often issue a series of rate orders approving successively higher rates for a particular movement. Under the Court of

[20]See p. 8-9 *supra*.

Appeals' ruling, any time a subsequent rate order is set aside by a reviewing court, the carrier will be required to roll back its tariff to the level prescribed by the "last lawful" Commission order, no matter how outdated that order might be, and with no provision for recovery of the revenues lost during the period of the tariff rollback.

Such a rule will seriously impair the carriers' ability to earn adequate revenues during times of rapidly rising costs. Worse, the effects of the Court of Appeals' ruling will be felt not just by those carriers subject to the Interstate Commerce Act, but by many regulated industries. Several other regulatory statutes—including the Communications Act, the Federal Power Act, and the Natural Gas Act—are directly patterned after the provisions of the Interstate Commerce Act.[21] Thus, the court's ruling will have a considerable disruptive effect on a wide variety of vital industries in which there is a strong public interest in the rapid and efficient adjustment of rates to account for economic fluctuations.

Under the Court of Appeals' decision, once the Commission has established a maximum rate order, the carrier will have to secure not only an order from the Commission, but also the reviewing court's *approval* of that order, before rates can be lifted. If the reviewing court disapproves the Commission's order for any reason, the rates will automatically bounce back to the level established under the original order, and the carrier will have to start all over again. The Court of Appeals' ruling thus creates a version of "regulatory lag" which will make it difficult if not impossible for railroads to keep up with inflation.

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[21] *See Arkansas Louisiana Gas Co.* v. *Hall*, *supra*, 101 S.Ct. at 2933 n.7 (Natural Gas Act patterned on Interstate Commerce Act); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956) (Federal Power Act ratemaking provisions identical to Natural Gas Act and Interstate Commerce Act); *American Broadcasting Cos.* v. *FCC*, 643 F.2d 818, 820-22 (D.C. Cir. 1980) (Communications Act patterned on Interstate Commerce Act).

In addition, the decision below disturbs the ratemaking scheme by imposing an unwarranted burden on the carrier's exercise of its right to judicial review. Under the Court of Appeals' ruling, if the Commission modifies an outdated rate order with another rate order which the carrier also considers unduly restrictive, the carrier will face an unhappy dilemma. If the carrier does not file a petition for review challenging the second order, then it must live with an order it considers too restrictive. But if it does file a petition for review, and the Court of Appeals *grants* the petition and vacates the second order, the fruits of this "victory" could be a requirement that the carrier roll back its tariffs to the even lower level. This threat could act as a powerful deterrent to the filing of even the most meritorious appeals by regulated carriers.

At the same time, the Court of Appeals' ruling will create an undue incentive for shippers to challenge rate orders which modify earlier (and lower) orders. If a shipper files a petition for review, and it is granted, the shipper will receive as a bonus a mandated tariff rollback to the level established by the earlier order. The possibility of such a windfall gain will provide an incentive for the filing of nonmeritorious petitions for review by shippers.

The Court of Appeals' order will thus prove highly disruptive to the ratemaking scheme established by the Act. The Court of Appeals itself recognized the potential for disruption, but believed that these consequences could be minimized because the Commission could grant "[s]uitable interim action which would protect the interests of the railroads." 655 F.2d at 1345 (App. A-6). However, the court did not specify what sort of "interim action" it had in mind.

In point of fact, any such "interim action" would entail substantial delay and irreparable loss of revenues to the railroads. One procedure—which, at the Commission's suggestion, was followed in this case—would be for the railroads to file a new tariff.

However, when the railroads filed such a tariff in this case in November, 1980, San Antonio vigorously contested the legality of this procedure. Even after the Commission refused to suspend the tariff, and it became effective, San Antonio refused to pay any rate higher than the rate prescribed in *San Antonio I*. It was not until May 7, 1981, under the compulsion of a ruling by the Court of Appeals for the Fifth Circuit, that San Antonio acquiesced in paying the applicable tariff rate. Even then, the Fifth Circuit did not reach the merits of San Antonio's procedural claims,[22] and the legality of this procedure remains the subject of controversy.

Another possible procedure would be for the railroads to petition the Commission to reconsider the "revived" rate order. This procedure, however, would require the institution of an entirely new Commission proceeding, including the filing of a petition to reopen, the filing of evidence by the parties, protracted consideration of that evidence by the Commission, and ultimately the issuance of a new decision. Such a decision, of course, would itself also be subject to judicial review, and if set aside would presumably again result in reinstatement of the "revived" rate order.

In short, there is no satisfactory procedure available to the railroads which would eliminate the disruptive impact of the rule established by the Court of Appeals.[23]

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[22]The Fifth Circuit ruled that the Commission's April 7 order (dated April 3, 1981), which became effective on May 7, was not a "final order" subject to judicial review. 652 F.2d at 423.

[23]San Antonio contends that the decision below requires a rate rollback both following the issuance of the Court of Appeals' mandate on July 24, 1980 and back to the issuance of the Commission's order in *San Antonio II* in 1978. If this interpretation of the Court of Appeals' decision were correct, then by definition there would be no acceptable avenue of interim relief, since the issuance of the reviewing court's order would immediately impose retroactive consequences on the carriers. Needless to say, the railroads do not agree with San Antonio's interpretation of the court's decision.

Thus, the Court of Appeals' ruling not only misconceives several of this Court's previous holdings, but it does so in a manner that is likely to cause immediate and severe disruption of the regulatory scheme at a time when Congress is attempting through legislation to improve the financial positions of carriers such as Petitioners herein.

CONCLUSION

For the foregoing reasons, certiorari should be granted and the decision below should be summarily reversed on the authority of *Consolidated Rail, supra*, and *Arkansas Louisiana Gas, supra*. In the alternative, certiorari should be granted, and the case should be set for briefing and oral argument.

Respectfully submitted,

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November 24, 1981

Appendix

81-1008

Office - Supreme Court, U.S.
FILED
NOV 24 1981
ALEXANDER L. STEVAS
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NO. 81-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

Burlington Northern Inc. and Southern Pacific Transportation Company,

Petitioners,

v.

United States of America and Interstate Commerce Commission,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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STATUTORY APPENDIX

The Interstate Commerce Act, codified at 49 U.S.C. §10704(a)(1), provides:

> (a)(1) When the Interstate Commerce Commission, after a full hearing, decides that a rate charged or collected by a carrier for transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, or that a classification, rule, or practice of that carrier, does or will violate this subtitle, the Commission may prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed. The Commission may order the carrier to stop the violation. When a rate, classification, rule, or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate and shall adopt the classification and observe the rule or practice prescribed by the Commission.

The Interstate Commerce Act, as amended by section 207 of the Staggers Rail Act of 1980, 94 Stat. 1907, codified at 49 U.S.C. §10707, provides:

> (a) When a new individual or joint rate or individual or joint classification, rule, or practice related to a rate is filed with the Interstate Commerce Commission by a rail carrier providing transportation subject to its jurisdiction under subchapter I of chapter 105 of this title, the Commission may begin a proceeding, on its own initiative or on complaint of an interested party, to determine whether the proposed rate, classification, rule, or practice violates this subtitle.
>
> * * *
>
> (2) If an interested party has filed a complaint under subsection (a) of this section, the Commission may set aside a rate, classification, rule, or practice that has become effective under this section if the Commission finds it to be in violation of this chapter.

(d)(1) If the Commission does not suspend a proposed rate increase under subsection (c) of this section, the Commission shall require the rail carrier to account for all amounts received under the increase until the Commission completes its proceedings under subsection (b) of this section. The accounting shall specify by whom and for whom the amounts are paid. When the Commission takes final action, it shall require the carrier to refund to the person for whom the amounts were paid that part of the increased rate found to be unreasonable, plus interest at a rate equal to the average yield (on the date the statement is filed) of marketable securities of the United States Government having a duration of 90 days.

(2) If a rate is suspended under subsection (c) of this section and any portion of such rate is later found to be reasonable under this title, the carrier shall collect from each person using the transportation to which the rate applies the difference between the original rate and the portion of the suspended rate found to be reasonable for any services performed during the period of suspension, plus interest at a rate equal to the average yield (on the date the statement is filed) of marketable securities of the United States Government having a duration of 90 days, except that this paragraph shall not apply to general rate increases under section 10706 of this title.

(3) If any portion of a proposed rate decrease is suspended under subsection (c) of this section and later found to be reasonable under this title, the rail carrier may refund any part of the portion of the decrease found to comply with this title if the carrier makes the refund available to each shipper who participated in the rate, in accordance with the relative amount of such shipper's traffic transported at such rate.

The Interstate Commerce Act, codified at 49 U.S.C. §10761, provides:

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this

> title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

The Interstate Commerce Act, codified at 49 U.S.C. §11902, provides:

> A person (1) delivering property to a common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . for transportation under this subtitle . . . and (2) knowingly accepting or receiving by any means a rebate or offset against the rate for transportation for, or service of, that property contained in a tariff filed with the Commission . . . is liable to the United States Government for a civil penalty . . .

The Interstate Commerce Act, codified at 49 U.S.C. §11903, provides:

> (a) A person that knowingly offers, grants, gives, solicits, accepts, or receives by any means transportation or service provided for property by a common carrier subject to the jurisdiction of the Interstate Commerce Commission . . . (1) at less than the rate in effect under section 107 of this title, . . . shall be fined at least $1,000 but not more than $20,000, imprisoned for not more than 2 years, or both.
>
> (b) A carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title . . . that willfully does not file and publish its rates or tariffs as required under chapter 107 of this title or observe those tariffs until changed under law, shall be fined at least $1,000 but not more than $20,000, imprisoned for not more than 2 years, or both.

The Judicial Code, 28 U.S.C. §2349(a), provides:

> (a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

APPENDIX A

SAN ANTONIO, TEXAS Acting By and Through Its CITY PUBLIC SERVICE BOARD, Petitioner,

v.

UNITED STATES of America and Interstate Commerce Commission, Respondents,

Burlington Northern, Inc., et al., Intervenors.

STATE OF TEXAS, Petitioner,

v.

UNITED STATES of America and Interstate Commerce Commission, Respondents,

Burlington Northern, Inc., et al., Intervenors.

BURLINGTON NORTHERN, INC., et al., Petitioners,

v.

UNITED STATES of America and Interstate Commerce Commission, Respondents,

City of San Antonio, Texas, et al., Intervenors.

Nos. 78-2051, 78-2216, 78-2307.

United States Court of Appeals, District of Columbia Circuit.

30 June 1981.

R. Eden Martin, Washington, D. C., with whom Howard J. Trienens, Richard J. Metzger, Thomas W. Merrill, Chicago, Ill., and John Will Ongman, Washington, D. C., for Railroad Petitioners, were on the Petition for Clarification of Mandate.

William L. Slover, C. Michael Loftus and John H. LeSeur, Washington, D. C., were on the response to Petition for Clarification of Mandate for petitioner San Antonio, Texas.

Richard A. Allen, Kathleen M. Dollar, and Evelyn G. Kitay, Interstate Commerce Commission, Washington, D. C., were on the response to Petition for Clarification of Mandate for respondent Interstate Commerce Commission.

Before ROBB, WILKEY and WALD, Circuit Judges.

Opinion for the Court filed by Circuit Judge WILKEY.

WILKEY, Circuit Judge:

On 9 June 1980 this court vacated an order of the Interstate Commerce Commission.[1] The railroads party to the case now seek clarification of the legal effect of our ruling in a "petition for clarification of mandate."

Ultimately at issue in this litigation is the rate to be charged for shipment of coal by unit-train from Cordero Junction, Wyoming, to Elmendorf, Texas, a suburb of San Antonio. The facts and history of the case already have been set out at length in our opinion and those of the ICC; we will not repeat them here beyond the barest of summaries.

The critical events, in chronological order, are as follows:

(1) On 14 October 1976 the ICC prescribed a maximum reasonable rate of $10.93 per ton.[2] The ICC's order con-

[1] *San Antonio, Texas* v. *United States*, 631 F.2d 831 (D.C.Cir.1980).
[2] *San Antonio, Texas* v. *Burlington Northern, Inc.*, 355 I.C.C. 405 (1976), *aff'd*, 555 F.2d 637 (8th Cir. 1977).

tained no expiration date, but was to "continue in full force and effect until the further order of the Commission."[3] This order has become known as *San Antonio I*.

(2) At the request of the railroads, the ICC reopened its proceedings, ultimately issuing two further orders,[4] now known as *San Antonio II* and *San Antonio III*, in which the rate ceiling was raised, first to $16.12 per ton and then to $17.23 per ton. Under the authority of these orders the railroads filed tariffs setting rates above the *San Antonio I* rate ceiling.

(3) Then, the City of San Antonio, the State of Texas, the United States Department of Energy, and the railroads all petitioned this court for review of the ICC's *San Antonio II* and *San Antonio III* orders. We vacated the orders and remanded the case to the Commission for proceedings not inconsistent with our opinion.[5]

At issue now is whether our ruling vacating the *San Antonio II* and *San Antonio III* orders has the effect of rendering unlawful tariff rates above the *San Antonio I* ceiling filed by the railroads under the authority of the vacated orders.

The City of San Antonio takes the position that the effect of our decision vacating the Commission's orders is to restore the situation to the *status quo* before the vacated orders were issued. Because the *San Antonio II* and *San Antonio III* orders have been vacated, they argue, the *San Antonio I* order has sprung back to life "continu[ing] in full force and effect until the further order of the Commission."[6] The railroads thus are now permitted to charge only rates at or below the maximum prescribed rate set in *San Antonio I*.

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[3] *Id.* at 418.

[4] *San Antonio, Texas* v. *Burlington Northern, Inc.*, 359 I.C.C. 1 (1978); *San Antonio, Texas* v. *Burlington Northern, Inc.*, 361 I.C.C. 482 (1979).

[5] *San Antonio, Texas* v. *United States*, 631 F.2d 831 (D.C. Cir. 1980).

[6] 355 I.C.C. at 418.

The railroads, on the other hand, argue that they are still free to charge the rates set by their published tariffs filed under the authority of the now-vacated ICC orders. The ICC, after siding with the City of San Antonio, has reversed its position and endorsed that of the railroads.[7]

The railroads, now joined by the Commission itself, are in error. The intent and effect of our decision vacating the ICC's orders in *San Antonio II* and *San Antonio III* was to do just what we said: to vacate those orders. Nothing more was intended, expressly indicated, or implicitly suggested.

In the present case, the *status quo* prior to the *San Antonio II* and *San Antonio III* orders is determined by the Commission's order in *San Antonio I*. The *San Antonio I* order was superseded for a time by the Commission's *San Antonio II* and *San Antonio III orders,* but with those orders vacated, *San Antonio I* did continue in force pending further ICC action.

In the wake of our ruling, of course, the railroads have been and are free to petition the ICC to amend temporarily the *San Antonio I* maximum rate prescription; such action by the ICC could permit the railroads to publish tariffs in excess of the *San Antonio I* limit. Should the ICC ultimately determine that the tariffs published are too high, reparations could be made available to the affected shippers. In the absence of ICC action, however, the *San Antonio I* order has remained in effect. Tariffs in excess of it have been therefore unlawful.

Even had we wished to do so we could not have achieved the result the railroads now seek. That should be more plain than ever after the Supreme Court's decision this Term in *Consolidated Rail Corp.* v. *National Association of Recycling Industries, Inc.*

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[7]*San Antonio, Texas* v. *Burlington Northern, Inc.*, 364 I.C.C. 887 (1981).

(Consolidated Rail),[8] if it was not clear enough after the Court's earlier decision in *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade (Atchison, Topeka).*[9] For while this court has the authority to set aside an ICC action found to be without justification in the record, the Supreme Court has made it crystal clear that we are without authority to determine interim transportation policy pending further ICC action after a decision of this court vacating an ICC order. Except in unusual circumstances, our authority is at an end once we set aside an ICC order under review.

In *Consolidated Rail,* for example, this court vacated an ICC order setting the maximum reasonable rate for transportation of recyclables. We then purported to revoke rate increases that the railroads had filed under the umbrella of the vacated Commission order. No other outstanding ICC order, however, prevented the railroads from filing the higher rates; instead, we took affirmative action on our own to order that the rates be rescinded. In so doing we attempted to do more than merely restore the *status quo ante.* The Supreme Court reversed us, ruling that this court lacks the authority to take affirmative actions of its own to set interim transportation policy. As the Court said: "The authority to determine when any particular rate should be implemented is a matter which Congress has placed squarely in the hands of the Commission."[10]

In *Consolidated Rail* the Supreme Court relied in part on its earlier decision in *Atchison, Topeka.* In that case, the ICC had approved tariffs filed by the railroads. The reviewing court, finding no adequate explanation for an apparent deviation by the ICC from its own precedent, vacated the ICC order. The court purported to suspend the rates filed by the railroads pending further

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[8] U.S. , 101 S.Ct. 755, 66 L.Ed.2d 776 (1981).

[9] 412 U.S. 800, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973).

[10] 101 S.Ct. at 777.

ICC proceedings on remand. As in *Consolidated Rail*, the Supreme Court in *Atchison, Topeka* reversed the reviewing court's suspension of the railroads' tariffs, because the vacation of the ICC order alone did not have the effect of suspending the railroads' tariffs, so that a separate injunction not authorized by statute was necessary to accomplish that end. As the Court said:

> [A]n injunction forbidding the railroads to implement a proposed change in rates is not, strictly speaking, an injunction suspending the Commission's order . . . . The only consequence of suspending that order is that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable. In an action for reparations, for example, the railroads could not gain any benefit from the purported Commission approval of the increases. The Commission's order also provided that the proceedings be discontinued, and suspension of the order requires the Commission to reopen its inquiry.
>
> *Carriers may put into effect any rate that the Commission has not declared unreasonable.* Suspension of the Commission's order thus does not in itself preclude the carriers from implementing a new rate.[11]

The Supreme Court has thus made clear that, except in extraordinary circumstances, reviewing courts do not have the authority to determine interim policy pending new Commission action after the vacation of a Commission order.[12]

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[11] 412 U.S. at 818-19, 93 S.Ct. at 2380-81 (emphasis added) (citations omitted).

[12] To be sure, in *Consolidated Rail* and in *Atchison, Topeka* the Court's vacation of the Commission's orders had the practical effect of enabling the railroads to continue with their already-filed tariffs; no outstanding Commission order prevented them from so doing. In the present case, on the other hand, the effect of our vacation of the Commission's orders has been to subject the railroads to the consequences of an earlier Commission finding that the higher tariffs are unreasonable. This difference in practical effect, however, is not the result of some action by this court, but the consequence of a preexisting ICC order forbidding higher tariffs.

In the case before us, then, this court has had only the authority to vacate the ICC orders in *San Antonio II* and *III*. Because the vacation of those orders revived the ICC's own *San Antonio I* order, our decision has had the practical effect of rendering unlawful the railroads' tariffs filed under the umbrella of the vacated *San Antonio II* and *III* orders. Had we wished to permit the railroads to maintain their tariffs after we vacated the *San Antonio II* and *III* orders, we would have had somehow to strike down the *San Antonio I* order, which was still outstanding and *not* before us for review. This we did not have the power to do.

The Commission, of course, has been, and is, in a position to take whatever action consistent with the statute it considers appropriate with respect to the rates to be charged by the railroads. And the railroads have been and remain free to petition the Commission to take such action on their behalf as they deem appropriate. Suitable interim action which would protect the interests of the railroads has been and is available to the Commission, if not to this court. The railroads should seek relief where it can be granted—at the ICC, not this court. In this regard, we note that since this case was decided, the Commission has vacated the *San Antonio I* rate prescription, effective 7 May 1981.[13] The matter is now entirely in the hands of the Commission free of the orders in *San Antonio I, II,* and *III*.

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[13] *San Antonio, Texas* v. *Burlington Northern, Inc.*, 364 I.C.C. 887 (1981).

APPENDIX B

SAN ANTONIO, TEXAS Acting By and Through Its CITY PUBLIC SERVICE BOARD, Petitioner,

v.

UNITED STATES of America and Interstate Commerce Commission, Respondents,

Burlington Northern, Inc., et al., Intervenors.

STATE OF TEXAS, Petitioner,

v.

UNITED STATES of America and Interstate Commerce Commission, Respondents,

Burlington Northern, Inc., et al., Intervenors.

BURLINGTON NORTHERN, INC., et al., Petitioners,

v.

UNITED STATES of America and Interstate Commerce Commission, Respondents,

City of San Antonio, Texas, et al., Intervenors

Nos. 78–2051, 78–2216 and 78–2307.

United States Court of Appeals, District of Columbia Circuit.

Decided 9 June 1980.

As Amended on Denial of Rehearing July 16, 1980.

Rehearing Denied July 16, 1980.

William L. Slover, Washington, D. C., with whom C. Michael Loftus, Washington, D. C., and Donald G. Avery were on the brief for petitioner San Antonio, Texas in No. 78-2051.

J. David Hughes, Asst. Atty. Gen., Austin, Tex., with whom Stuart Fryer, Asst. Atty. Gen Austin, Tex., were on the brief for petitioner State of Texas in No. 78-2216.

R. Eden Martin, Chicago, Ill., with whom John Will Ongman and Howard J. Trienens, Chicago, Ill., were on the brief for petitioners Burlington Northern, Inc., et al., in No. 78-2307.

Carl E. Glaze, Dallas, Tex., also entered an appearance for the petitioner State of Texas in No. 78-2216.

Robert Lewis Thompson, Atty., Dept. of Justice, Washington, D.C., with whom John J. Powers, III, Atty., Dept of Justice, Washington, D.C., were on the brief for respondent United States.

Kathleen M. Dollar, Atty., I. C. C., Washington, D.C., with whom Robert S. Burk, Deputy Gen. Counsel and Henri F. Rush, Associate Gen. Counsel, Washington, D.C., were on the brief for respondent I. C. C.

Mark L. Evans and Kenneth G. Caplan, Washington, D.C., also entered appearances for respondent I. C. C.

Lee A. Monroe, Washington, D.C., and Joseph B. Tompkins, Jr., also entered appearances for intervenor Burlington Northern, Inc.

Petitions for Review of Orders of the Interstate Commerce Commission.

Before ROBB, WILKEY and WALD, Circuit Judges.

Opinion for the Court filed by Circuit Judge WILKEY.

WILKEY, Circuit Judge:

This action arises on petitions to review orders of the Interstate Commerce Commission (ICC or Commission) served 25 October 1978 and 1 June 1979, which prescribed maximum reasonable rates for unit-train shipments of coal from Cordero Junction, Wyoming to Elmendorf, Texas, a suburb of San Antonio, Texas.[1] This case marks the second time that a court has been called upon to review a final order of the ICC setting a maximum reasonable rate for the above described traffic. In a decision served 14 October 1976 (*San Antonio I*)[2] the Commission set a rate of $10.93 per ton, and this decision and order was affirmed by the United States Court of Appeals for the Eighth Circuit.[3]

At the request of the railroads, the Commission reopened the San Antonio proceeding with a view to modifying this rate. On 25 October 1978 the Commission issued a decision (*San Antonio II*) which prescribed a higher rate of $16.12 per ton.[4] San Antonio and the carriers petitioned the Commission for administrative review of its decision, and at the same time San Antonio, the State of Texas, the United States Department of Energy, and the railroads all petitioned this court as well for review of the Commission's decision.

In response to the petitions for reconsideration, the Commission on 1 June 1979 issued a further decision (*San Antonio III*)

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[1]The coal is hauled to San Antonio by joint routing over four railroads: Burlington Northern, Inc. (BN) and its subsidiaries, the Colorado and Southern Railway Company (C&S), Forth Worth and Denver Railway Company (FW&D); and the Southern Pacific Transportation Company (SP).

[2]*San Antonio, Texas* v. *Burlington Northern, Inc.*, 355 I.C.C. 405 (1976) (*San Antonio I*) *aff'd*, 555 F.2d 637 (8th Cir. 1977).

[3]*Burlington Northern, Inc.* v. *United States*, 555 F.2d 637 (8th Cir. 1977).

[4]*San Antonio, Texas* v. *Burlington Northern, Inc.*, 359 I.C.C. 1 (1978) (*San Antonio II*).

which established a rate of $17.23 per ton.[5] Subsequently, this court granted the parties' motions to amend their petitions for review of the *San Antonio II* decision to include the Commission's decision in *San Antonio III*.[6] For reasons that appear below, we vacate the Commission's orders and remand for further proceedings.

In the interest of convenience and clarity, we include an outline of the opinion to follow:

I. FACTUAL AND PROCEDURAL BACKGROUND

II. ANALYSIS

A. *Comparable Rates*

B. *Cost Determinations*

1. *Locomotive Costs—Capital Costs*

2. *Locomotive Costs—Fuel and Maintenance Expenses*

3. *Allocation of Fixed Costs*

4. *Fixed Plant Investment Additive*

5. *Roadway Maintenance Expenses*

6. *Federal Taxes*

C. *Revenue Adequacy—Mandate of the 4-R Act*

1. *Reliance on Cost of Capital Figure*

2. *Seven Percent Additive Above Fully Allocated Costs*

D. *Environmental Immplications*

III. CONCLUSION

[5] *San Antonio, Texas* v. *Burlington Northern, Inc.*, 361 I.C.C. 482 (1979) (*San Antonio III*).

[6] The petition of the Department of Energy was withdrawn upon notice to the court that the Department's interests would be represented by the United States Department of Justice.

I. FACTUAL AND PROCEDURAL BACKGROUND

This matter initially was brought before the Commission by complaint of San Antonio, requesting the Commission to prescribe a maximum just and reasonable rate for the movement of coal from Cordero Junction, Wyoming to San Antonio, Texas. The factual background is set forth in detail in the opinion affirming the Commission's order in the original proceeding,[7] and we may briefly recall those facts here.

San Antonio, acting through its City Public Service Board, owns and operates an electric utility, which before 1972 used natural gas as a primary fuel. In that year, with the sudden, dramatic increase in the cost of natural gas, San Antonio began exploring the possibility of using coal to generate electricity. On 22 May 1974 San Antonio entered into long-term contracts to purchase coal from two suppliers in Campbell County, Wyoming, and at about the same time began construction of two coal-fired generating units. Previously, on 11 March 1974 Burlington Northern, Inc. (BN or Burlington Northern) and Southern Pacific Transportation Company (SP or Southern Pacific) had provided San Antonio with a copy of a proposed tariff setting forth a rate of $7.90 per ton for the transportation of coal by unit-train from the mines in Campbell County, Wyoming to San Antonio, but on 2 May 1974 the carriers revised their quotation to $11.90 per ton as a result of unprecedented cost increases. Approximately one year later, San Antonio, being dissatisfied with the rate proposed by the railroads, filed a complaint with the Commission seeking prescription of a just and reasonable rate.

The Commission in a decision served 14 October 1976 (*San Antonio I*),[8] established a rate of $10.93 per ton for the San

[7] *See Burlington Northern, Inc.* v. *United States*, 555 F.2d 637, 639 (8th Cir. 1977).

[8] *San Antonio I*, 355 I.C.C. 405 (1976), *aff'd*, 555 F.2d 637 (8th Cir. 1977).

Antonio movement, basing its determination primarily on evidence of rate levels for unit-train movements similar to the San Antonio service and on estimates of the fully allocated costs of the service.[9] The Commission stated that its decision was a temporary response to permit the coal movement to begin, and it invited petitions for modification of the rate when actual experience in operating the trains was gained. On petition to review the Commission's decision and order prescribing the San Antonio rate, the United States Court of Appeals for the Eighth Circuit, affirmed.[10]

After six months of operation, the railroads petitioned the Commission in June 1977 for a modification of the rate, and in October 1977 the ICC reopened the San Antonio proceeding.[11] One year later, on 25 October 1978 the Commission issued a decision (*San Antonio II*) that prescribed a rate of $16.12 per ton for the San Antonio movement.[12] The rate was based on a computation of the full costs of the San Antonio service calculated at $12.65 per ton, and adjusted to include a 10.2% rate of return on

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[9]The term "fully allocated costs" is defined as "that level of expenses which represents the sum of the 'variable costs' plus an appropriate allocation of fixed expenses, *i.e.*, an allocation which assigns an adequate portion of fixed expenses to the movement of traffic on which the rate in issue applies." *Rules to Govern the Assembling and Presenting of Cost Evidence*, 337 I.C.C. 298, 308 (1970).

[10]*Burlington Northern, Inc. v. United States*, 555 F.2d 637 (8th Cir. 1977).

[11]The Commission ruled that it would consider the following matters in the reopened proceeding: (1) errors in the Commission's costing methodology in its prior decision, (2) new cost evidence based on actual operating experience, (3) evidence concerning the question of what constitutes a fair and reasonable profit or return, and (4) any appropriate rate comparisons reflecting changed circumstances in similar Western coal movements. *See San Antonio, Texas v. Burlington Northern, Inc.*, I.C.C. Docket No. 36180, at 2 (27 Oct. 1977), *reprinted in* Joint Appendix (J.A.) at 36, 36a.

[12]*San Antonio II*, 359 I.C.C. (1978).

the carriers' investment as a "revenue neeed" factor.[13] Consideration of the latter criterion was intended to reflect adherence to the Railroad Revitalization and Regulatory Reform Act of 1976 (4–R Act), which directs the Commission to aid the railroads in obtaining revenue levels adequate to cover total operating expenses plus a fair return on capital for the purpose of restoring the financial stability of the railway system.[14]

Both San Antonio and the carriers petitioned the Commission for reconsideration of its decision in *San Antonio II*, and on 1 June 1979 the Commission issued a further decision (*San Antonio III*) which established a rate of $17.23 per ton for the San Antonio movement.[15] The increased rate reflected certain modifications in the Commission's calculation of the costs of the service as well as the use of a 10.6% rate of return on capital instead of the 10.2% figure employed in *San Antonio II*.[16] In addition, the Commission determined that for the railroads to achieve adequate revenue levels in accord with the 4–R Act, the carriers must be permitted to set rates exceeding full costs on some services to compensate for the fact that competition forces the carriers to set rates on other services below full costs. The Commission stated

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[13]In response to the Commission's order reopening the proceeding, *see* note 11 *supra*, both the carriers and San Antonio submitted evidence of rates on allegedly comparable shipments, but the Commission elected not to attach "great weight" to these comparisons on the ground that coal rates in the West were in flux, *see San Antonio II*, 359 I.C.C. at 7; notes 22–27 *infra* and accompanying text.

[14]Pub.L. No. 94–210, § 205, 90 Stat. 39, 41, *as amended by* Pub.L. No. 95–473, 92 Stat. 1373 (1978) (codified at 49 U.S.C.A. § 10704(a)(2) (West Supp. 1978)). The San Antonio proceeding was initiated prior to the passage of the 4-R Act; thus the Eighth Circuit excused the Commission's failure to consider the impact of that statute in the *San Antonio I* decision.

[15]*San Antonio III*, 361 I.C.C. 482 (1979).

[16]The Commission's computation of the fully allocated costs of the San Antonio service, adjusted both to reflect a 10.6% rate of return on capital and to reflect the 1978 general rate increase for all traffic, equalled $16.10 per ton.

that no "simple formula" existed for ascertaining "the extent to which some shippers should subsidize others in the interest of producing a financially viable rail system."[17] Nevertheless that agency concluded that a rate set at 7% above full costs for the San Antonio movement (including the cost of capital figure) was reasonable as an interim solution, pending the development of more specific guidelines in another proceeding involving Western coal rates.[18]

The several parties to this case raise two main challenges to the Commission's orders in *San Antonio II* and *III*: The carriers and San Antonio dispute several of the Commission's determinations concerning the costs of providing service for the San Antonio movement. All of the parties attack, on various grounds, the Commission's imposition in *San Antonio III* of a 7% additive above fully allocated costs.[19] We find that certain of the Commission's cost calculations have no basis in the record and that the selection of the figure seven as a percentage additive above full costs is wholly without supporting rationale or justification. We accordingly set the Commission's orders aside and remand on these and other issues to be discussed.

II. ANALYSIS

Courts traditionally have applied a deferential standard in reviewing rate determinations by an agency. As the Supreme Court has observed:

> The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors

[17] *San Antonio III*, 361 I.C.C. at 495-96.

[18] *Id.* at 496 (*Ex Parte No. 347, Western Coal Investigation—Guidelines for Railroad Rate Structure* (instituted 17 May 1978)).

[19] The carriers, San Antonio, the State of Texas, and the United States Department of Energy all petitioned for judicial review of the Commission's decision in *San Antonio II*, and, following the Commission's decision in *San Antonio III*, these parties amended their petitions to include that decision. The United States Department of Energy, however, notified this court that its interests would be represented by the Department of Justice.

> that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.[20]

Bearing in mind that the determination of the reasonableness of rates primarily is the province of the agency charged with that duty, we nonetheless have an obligation to ascertain whether the Commission's decision comports with applicable law, whether there is evidence in the record to support the Commission's findings, and whether the agency's rationale is both discernible and defensible.[21]

Ordinarily one of the measures that the ICC uses in prescribing rates is evidence of rates from other, comparable movements, and the Commission accordingly considered this factor in its decision in *San Antonio I.* In establishing the maximum reasonable rate in *San Antonio II* and *III*, however, the Commission relied instead on its computations of the carriers' cost of service and the perceived revenue needs of the railroads. Before turning to a review of the Commission's cost evidence and revenue need factors, then, we first must determine whether the Commission abused its discretion in dispensing with the comparable rate standard.

A. *Comparable Rates*

When the Commission reopened the San Antonio ratemaking proceeding in October 1977, it invited the submission of evidence on "any existing rate comparisons which properly reflect similar conditions and transportation characteristics of the movements in

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[20] *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 806, 93 S.Ct. 2367, 2374, 37 L.Ed.2d 350 (1973) (quoting *Board of Trade* v. *United States*, 314 U.S. 534, 546, 62 S.Ct. 366, 372, 86 L.Ed. 432 (1942)).

[21] *See, e. g., National Ass'n of Recycling Indus., Inc.* v. *ICC, et al.*, 627 F.2d 1328, at 1334 (D.C.Cir. 1980) (*NARI II*).

question."[22] Both the railroads and San Antonio submitted conflicting evidence as to the rates, measured in mills per ton/mile, prevailing on comparable traffic.[23] In its decision in *San Antonio II*, however, the Commission stated that in light of the pendency of a proceeding to establish ratemaking guidelines applicable to Western coal rates (*Ex Parte No. 347, Western Coal Investigation—Guidelines for Railroad Rate Structure*),[24] it would not assign "great weight to rate comparisons which represent only a small portion of a large, developing rate structure. Unless an established rate structure exists, rate comparison is of limited value."[25] In *San Antonio III* the Commission again rejected

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[22]*San Antonio, Texas v. Burlington Northern, Inc.*, I.C.C. Docket No. 36180, at 2 (27 Oct. 1977), *reprinted in* J.A. at 36, 36a. In *San Antonio I* the Commission identified rates of two movements, measured in mills per ton/mile, that the Commission considered most comparable to the San Antonio movement. These rates coincided to movements of coal by unit train from the same origin point as the San Antonio traffic—Belle Ayr, Wyoming—to the destinations of Pueblo, Colorado; and Amarillo, Texas. *See San Antonio I*, 355 I.C.C. 405, 414–15 (1976), *aff'd*, 555 F.2d 637 (8th Cir. 1977). In reviewing the reasonableness of the prescribed rate, the Eighth Circuit concluded that the rate comparisons were the "strongest evidence in [the] case to support the Commission's conclusion that the prescribed rate is the maximum reasonable rate." *Burlington Northern, Inc.* v. *United States*, 555 F.2d 637, 641 (8th Cir. 1977).

[23]The carriers offered comparisons of rates from six other movements, *see San Antonio II*, 359 I.C.C. at 37, App. B; San Antonio presented evidence of comparisons from eleven other movements, *see id.* at 38–39, App. C.

[24]*Ex Parte No. 347* was instituted on 17 May 1978. *See id.* at 7.

[25]*Id.* (footnote omitted). The Commission's only other reference to the evidence submitted by the parties was the assertion that the evidence adduced suggested that the present rate was below a maximum reasonable rate. *See id.* At the time of the ICC's decision, the prescribed rate for the San Antonio traffic, expressed in mills per ton/mile, was 7.25 mills. The comparisons submitted by San Antonio reflected average earnings of 7.66 mills, *see id.* at 38–39, App. C; those submitted by the carriers reflected average earnings of 11.33 mills, *see id.* at 37, App. B.

evidence of allegedly comparable rates, advancing the same justification.[26]

San Antonio claims that the Commission's reasons for failing to resolve the conflicting evidence submitted by the parties and for thus abandoning the comparable rate standard are arbitrary and capricious. We disagree.

Courts properly are reluctant to interfere with an agency's choice of methodology in ratemaking matters.[27] Our review is directed to assuring only that the standards applied are reasonable. In this instance, for reasons sufficiently articulated in both *San Antonio II* and *III*, the ICC elected to rely on the costs of the service rather than evidence of rates on other movements in calculating the rate for the San Antonio traffic. The Commission's approach, provided the underlying cost calculations are substantiated in the record, is a reasonable means of arriving at a determination of the maximum reasonable rate to be prescribed. We thus find no abuse of discretion.

B. *Cost Determinations*

We next review the Commission's findings concerning the carriers' costs of serving the San Antonio traffic. Petitioners allege error with respect to the following cost items: locomotive costs, including capital costs and fuel and maintenance expenses; allocation of fixed costs; fixed plant investment additive; roadway maintenance expenses; and federal taxes.[28] We are mindful of the

[26] *See San Antonio III*, 361 I.C.C. at 497. The rate prescribed by the Commission in *San Antonio III* is equivalent to 10.4 mills per ton/mile.

[27] *See, e. g., FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602, 64 S.Ct. 281, 287, 88 L.Ed. 333 (1944); *Houston Lighting & Power Co.* v. *United States*, 606 F.2d 1131, 1148 (D.C.Cir.1979), *cert. denied*, 444 U.S. 1073, 100 S.Ct. 1019, 62 L.Ed.2d 755 (1980).

[28] The Department of Justice expresses no view on any particular cost calculation. The State of Texas agrees with San Antonio in general that the Commission's cost computations overstate the actual costs of the San Antonio unit-train movement, but takes no specific position on any cost item.

fact that the evaluation of evidence of a carrier's costs of providing a particular service is a function peculiarly adapted to the expertise of an agency;[29] nevertheless, we are bound to assess whether the Commission's cost findings are supported both by sufficient evidence in the record and adequate reasoning.

1. *Locomotive Costs—Capital Costs*

Power for the San Antonio movement is supplied by the railroads from a pool of locomotives, which are stationed at Alliance, Nebraska and which are assigned to various other unit-train movements as circumstances require.[30] To accommodate the San Antonio traffic, the railroads were required to purchase approximately fifty new diesel units. These locomotives were added to the Alliance pool and will be used by the railroads to handle other coal movements in addition to servicing San Antonio. One of the issues in this case arises from the fact that the Commission developed the capital costs of the locomotives to be taxed to the San Antonio movement by using the average cost of the pool locomotives actually utilized in the San Antonio service. The railroads insist the the Commission instead should have used the full cost of the new power units in making this calculation.[31]

[29] *See, e.g., Houston Lighting & Power Co.* v. *United States*, 606 F.2d 1131, 1146 (D. C. Cir. 1979), *cert. denied* 444 U.S. 1073, 100 S.Ct. 1019, 62 L.Ed.2d 755 (1980).

[30] The coal cars furnished by San Antonio consist of six sets of 100 cars each, weighing approximately 10,000 tons when loaded and requiring heavy duty, diesel locomotives.

[31] In *San Antonio II*, the railroads submitted evidence on the capital costs of the locomotives, based on the purchase price of 50 new locomotives acquired in 1976—a cost of $490,000 per unit. *See* Verified Statement of Marion L. Hall 28-32 & Exhibit MLH-5 (8 Dec. 1977), *reprinted in* J.A. at 383, 410-14, 458-59. In addition the carriers submitted calculations on this issue based on the average costs of the locomotives actually used on the San Antonio service. This evidence was derived from a three-month study conducted by the railroads, which indicated that the actual locomotives used for the San Antonio traffic were built between 1969 and 1976 with an average cost of $398,906 per unit.

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The carriers do not claim here that the newly acquired locomotives will be used exclusively in the San Antonio service; nor do they claim that only new locomotives will be used for that traffic. Rather, their position rests on the fact that, even though the entire pool of coal-train locomotives is not used to power the San Antonio service, the addition of that traffic necessitated the acquisition of the new locomotives. The railroads argue that San Antonio therefore should bear the entire cost of the new equipment irrespective of the fact that such equipment is placed in a pool and used interchangeably with other traffic.

We find that the Commission's approach in developing the capital costs of the San Antonio service was reasonable. The Commission had before it evidence furnished by the railroads of the average costs of the actual locomotives used to move the coal to San Antonio as well as evidence of the purchase price of the new locomotive.[32] Although the new power units were purchased to service San Antonio, clearly other coal traffic handled by Burlington Northern and Southern Pacific also reaps the benefit from this expansion of equipment. The Commission's election to compute capital costs based on the average costs of the actual locomotives used, so as not to charge San Antonio with the entire expense of the new power equipment, thus is entirely logical.[33]

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The Commission adopted the $398,906 figure as a base for developing the capital costs of the service, although it did not question the carriers' need to acquire additional locomotives to serve San Antonio. *See e.g., San Antonio II,* 359 I.C.C. at 33-34, App. A.

[32] *See* note 31 *supra* and accompanying text.

[33] The railroads also argue that the Commission's averaging method of computing capital costs leads to the impractical result of necessitating an increase in the rates to all other coal shippers whenever new equipment is purchased to service an additional unit-train movement. The Commission responds that the cost of new equipment may also be recouped through general revenue increases and increases in average Rail Form A costs to the extent that systemwide averages are augmented. It is our duty to review, not the wisdom, but the reasonableness of the

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2. *Locomotive Costs—Fuel and Maintenance Expenses*

The railroads next argue that the ICC erred in rejecting their proposed locomotive fuel and maintenance cost adjustments. To support the proposal the railroads did not submit data on amounts actually expended; rather, they adjusted systemwide average costs upward to the extent that the weight of the coal locomotives exceeded the systemwide average weight.[34] The Commission ruled the railroads' evidence insufficient, finding that "weight is not the only factor to be considered in adjusting the fuel and maintenance expenses."[35] The calculations were found inadequate because they did not account for other "factors such as horsepower, age of locomotives and type of locomotives, which would also influence the locomotive unit mile cost."[36] In the absence of actual cost data, the Commission used the systemwide average for fuel and maintenance in calculating variable costs.

The railroads contend that the ICC's determination is arbitrary because it is contrary to the Commission's disposition of the issue in *Incentive Rate on Coal—Hayden, Colorado to Kings Mill, Texas (Kings Mill)*[37] and *Annual Volume Rates on Coal—Wyoming to Flint Creek, Arkansas (Flint Creek)*,[38] both decided after *San Antonio II* but before *San Antonio III*. In *Kings Mill* and *Flint Creek* the ICC held that the ultilities had not demon-

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Commission's action. We cannot say that the Commission's position is unreasonable. Nor would it be unreasonable to make individual rate adjustments requiring the cost of each service ultimately to be calculated on the basis of equipment actually employed.

[34]Thus the maintenance and fuel costs were adjusted upward 71% for the C&S, 72% for the FW&D, 24% for the BN, and 15% for the SP. Verified Statement of Marion L. Hall, Exhibit MLH—4 at 7, 14, 20, 26 (8 Dec. 1977), *reprinted in* J.A. at 383, 430, 437, 443, 449.

[35]*San Antonio II*, 359 I.C.C. at 33, App. A.

[36]*Id.*

[37]359 I.C.C. 749, 808 App. B (1979).

[38]I.C.C. Docket Nos. 36970, 36980, App. C, at 18-19 (21 May 1979).

strated that the railroads' adjustment based on the locomotives' heavier weight was invalid, and therefore the Commission accepted the railroads' figures. The railroads argue the substantially the same evidence was presented in *San Antonio, Kings Mill,* and *Flint Creek,* that the same locomotive pool was involved in both *San Antonio* and *Flint Creek,* and that therefore the Commission should have accepted the railroads' figures in *San Antonio* or explained the difference in treatment.

We affirm the Commission's decision on this point. We do not believe that the Commission's decisions in *Kings Mill* and *Flint Creek* obligated it in *San Antonio III* to alter the disposition of the fuel and maintenance issue previously made in *San Antonio II.* That the Commission's decisions in *Kings Mill* and *Flint Creek* differed from its earlier disposition in *San Antonio II* indicates, if anything, that the Commission does not have a firm policy with respect to such locomotive costs,[39] but treats the question on a case-by-case basis. We do not have before us the records in *Kings Mill* and *Flint Creek* and do not intimate a view as to the correctness of the ICC's decisions there.[40] But, in the present case, we find

[39]Even if *Kings Mill* and *Flint Creek* represent some sort of fuel and maintenance cost policy, we do not think the Commission erred by not explaining the difference in approach here. The ICC could not have made such an explanation in *San Antonio II* because *Kings Mill* and *Flint Creek* had not been decided yet. The issue was not raised in the papers submitted prior to *San Antonio III,* and we cannot fault the Commission for not dealing with the question then. We also note that in *San Antonio, Texas* v. *Burlington Northern, Inc.,* 362 I.C.C. 161 (1979) (*San Antonio IV*), not reviewed here, the Commission did list reasons for the differing results in the three cases. *Id.* at 163-64.

[40]The railroads contend that "the same expert witness testified for the complainants, offering virtually the *same* evidence in the *same* language" in *San Antonio, Flint Creek,* and *Kings Mill,* Reply Brief of Railroad Respondents-Intervenors at 18 (emphasis in original), and copies of the testimony in each case are appended to their reply brief. Our perusal of the expert's testimony indicates that different evidence was presented in the three proceedings. Absent in *Kings Mill* and *Flint Creek* was his testimony quantifying the increased utilization of the

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that the Commission's treatment of fuel and maintenance costs is logical and that substantial evidence in the record supports it.

San Antonio's cost expert testified that fuel, constituting thirty percent of locomotive expenses, is consumed more efficiently in unit-coal train service because power is assigned on the basis of known trailing gross tonnage. He demonstrated that the annual mileage of locomotives used in the San Antonio service was double that of the system average, so that expenses that are a function of time (*e. g.*, inspections) would be lower. The witness also pointed out flaws in a study that the railroads had submitted in *Incentive Rate on Coal—Cordero, Wyoming to Smithers Lake, Texas*[41] to justify an adjustment of costs based on weight.[42] Thus, there is adequate evidence in the record to support the conclusion that fuel and maintenance costs for the unit-coal train locomotives here are not necessarily greater in proportion to their weight.

San Antonio II was initiated, *inter alia*, to allow the parties to request rate modifications supported by "new cost evidence based on the actual operating experience" of this traffic[43] The railroads, as the proponents of the upward adjustment of fuel and maintenance costs, had the burden to produce actual operating evidence that these costs exceeded systemwide averages.[44] Because no such

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pertinent unit-coal locomotives; absent in *Kings Mill* was his testimony regarding increased fuel efficiency of locomotives in unit-coal trains. Whether the absence of this evidence justified the decisions reached in *Kings Mill* and *Flint Creek* is an issue not before us. But the inclusion of this testimony along with other evidence presented in this record is sufficient to uphold the Commission's conclusion here.

[41]I.C.C. Docket No. 36608 (30 Nov. 1977), *aff'd sub nom. Houston Lighting & Power Co.* v. *United States*, 606 F.2d 1131 (D.C.Cir.1979), *cert. denied*, 444 U.S. 1073, 100 S.Ct. 1019, 62 L.Ed.2d 755 (1980).

[42]Verified Statement of Leroy E. Peabody, Jr. (13 Feb. 1978), *reprinted in* J.A. at 947, 969–73.

[43]*San Antonio, Texas* v. *Burlington Northern, Inc.*, I.C.C. Docket No. 36180, slip op. at 2 (27 Oct. 1977), *reprinted in* J.A. at 36, 36a.

[44]*See, e.g.*, 5 U.S.C. § 556(d) (1976); *San Antonio III*, 361 I.C.C. at 483–84; *San Antonio II*, 359 I.C.C. at 4, 7–8.

evidence was presented, and in view of record testimony that the proposed adjustment was incorrect, we find no error in the Commission's resolution of this issue against the railroads.

3. *Allocation of Fixed Costs*

The railroads also challenge the Commission's decision to use the ratio method rather than the ton/ton-mile method of allocating constant costs. In response to the carriers' objection that the ratio method produced a lower allocation of constant costs than the ton/ton-mile method, the Commission in *San Antonio II* explained its treatment of fixed costs as follows:

> The mere fact that one method produces higher or lower costs than the other does not support the use of either basis. Rather, our purpose is to determine the costs which are properly attributable to the traffic at issue.
>
> In docket No. 34013, *Rules to Govern [the] Assembling & Presenting [of] Cost Evidence*, 337 I.C.C. 298, 323 [& n.10] (1970), the Commission stated:
>
> > [T]he determination that one method is preferable to another method of allocating expenses in a particular situation, is a ratemaking function * * * [a logical and reasonable allocation of expenses in one ratemaking situation might not be so in another * * *.] For example, the *allocation of constant costs on a ton-mile basis, might (for ratemaking purposes), in certain circumstances, result in an inordinate portion of such costs being borne by extremely heavy-loading traffic, as compared to relatively light-loading traffic.*
>
> Consequently, we do not suggest that any single method is always proper. Since coal is characterized by heavy loadings, however, the dollar or ratio basis was, and is, a reasonable method of apportionment of constant costs to the affected traffic.[45]

[45] *San Antonio II*, 359 I.C.C. at 9 (emphasis added by Commission).

The railroads contend that this allocation decision is based on either no finding or on contradictory reasoning. They argue that if the selection of the ratio method is based on the method's lower apportionment of costs to heavy-loading traffic, that finding contradicts the Commission's statement that "[t]he mere fact" that a method produces higher or lower costs "does not support the use of either basis." If the determination is not made on that basis, then it is said to have no basis at all.[46]

We disagree. The Commission's rationale is not that the ton-mile method allocates to heavy loading coal *higher* costs, but that it allocates an *"inordinate portion"* of fixed costs. The reasoning is supported by the *Rules to Govern Assembling and Presenting Cost Evidence*, quoted by the Commission in its decision.[47] Further, use of the ratio rather than the ton-mile method appears to be the general course followed by the Commission in Western coal cases.[48] We conclude that the Commission's method of allocation is reasonable and adequately explained in its decision.[49]

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[46]Brief of Railroad Petitioners-Intervenors at 41.

[47]*San Antonio II*, 359 I.C.C. at 9 (quoting 337 I.C.C. 298, 323 & n.10 (1970)).

[48]*E. g., Bituminous Coal, Hiawatha, Utah to Moapa, Nevada*, I.C.C. Docket No. 36938 (31 July 1979); *Unit Train Rates on Coal—Burlington Northern, Inc.*, I&S Docket No. 9199, I.C.C. Docket Nos. 36944, 37021, 37029, App. A at 122 (13 July 1979); *Arkansas Power & Light Co.*, I.C.C. Docket No. 36719, slip. op. at 12–13 (14 June 1979); *Annual Volume Rates on Coal—Wyoming to Flint Creek, Arkansas*, I.C.C. Docket No. 36970, 36980, App. C at 44 (21 May 1979).

[49]The railroads also argue that use of inconsistent methods of cost allocation could result in a revenue shortfall. This might well be the case if the Commission always selected the apportionment method that resulted in lower cost allocation. No evidence is presented that the Commission has engaged in such a practice.

Allocation of fixed costs is a ratemaking function particularly within the Commission's expertise, and we are reluctant to interfere with its exercise of discretion in this area. In the absence of a showing that the Commission has embarked on a policy sure to prevent recovery of fixed costs, we decline to disturb its determination here.

4. *Fixed Plant Investment Additive*

Normally, fixed plant investment costs apportioned to new rail traffic are calculated using Rail Form A.[50] Rail Form A, a formula published by the Commission's Bureau of Accounts to determine rail freight service costs, divides among all rail traffic, *inter alia*, the railroad's fixed plant investment costs. The fixed plant investments entered in Rail Form A include such items as track structure, land value, shops, and engine houses.[51] Ordinarily, the amounts invested to handle the San Antonio traffic would be included with other investment in Rail Form A, and San Antonio, as any other customer, would bear its share of the total investment costs.

Fifty percent of fixed plant investment costs are assigned as variable costs of service; the other fifty percent are attributed to constant costs.[52] The amount assigned as variable costs to particular traffic may be said to be the Rail Form A estimate or "prediction" of the amount of fixed plant investment caused by that traffic.

In this case, the ICC believed that actual investment costs caused by the San Antonio movement would exceed the amount predicted by Rail Form A.[53] Believing it more fair to allocate these coal-related investment costs directly and exclusively to coal shippers (rather than requiring all traffic to share them),[54] the ICC developed a fixed plant investment additive. The additive was computed by tabulating the amounts spent by the railroads in

[50]ICC Bureau of Accounts, Rail Form A (Statement IFI-73) Formula for Use in Determining Rail Freight Service Costs (1973).

[51]ICC Bureau of Accounts, Explanation of Rail Cost Finding Procedures and Principles Relating to the Use of Costs (Statement No. 7-63) 110-11 (1963).

[52]ICC Bureau of Accounts, Rail Carload Cost Scales 1976 (Statement No. ICI-76) 156, 184.

[53]*San Antonio III*, 361 I.C.C. at 486; *San Antonio II*, 359 I.C.C. at 11.

[54]*San Antonio III*, 361 I.C.C. at 489.

1976 and 1977 for capital improvements to handle new coal traffic.[55] Included in the additive were investment costs for items such as rails, ties, rail anchors, and a new diesel shop[56]—precisely the kind of investment costs that Rail Form A allocates.[57] These investment costs were divided exclusively among the coal shippers[58] using the improvements[59] and not entered in Rail Form A.[60] The additive, so computed, was added to the ICC's variable cost-of-service calculation, *which already reflected the Rail Form A estimate of San Antonio's share of fixed plant investment costs.*[61]

San Antonio argues that the use of both the Rail Form A prediction and the additive results in a double count of investment

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[55]*See* Verified Statement of Marion L. Hall 32-34, Exhibit MLH-7 (8 Dec. 1977), *reprinted in* J.A. at 383, 414-16, 461-62.

[56]*See id.* at 33, *reprinted in* J.A. at 415; Verified Statement of Jerry R. Masters 2-11 (5 Dec. 1977), *reprinted in* J.A. at 325, 326-35.

[57]*See* note 51 *supra.*

[58]We note that as part of the status reports ordered in *San Antonio III* the ICC requested "[t]he basis for and the percentages used to allocate fixed plant investment costs among coal and noncoal shippers." 361 I.C.C. at 503, App. B. This implies that the Commission contemplates that noncoal shippers may eventually pick up part of the cost of new investment through their own additive. At least in this case, however, the record indicates the fixed plant investment costs are shared only by coal unit trains. Verified Statement of Marion L. Hall 33 (8 Dec. 1977), *reprinted in* J.A. at 415; Verified Statement of Jerry R. Masters 9-10 (5 Dec. 1977), *reprinted in* J.A. at 333-34.

[59]Verified Statement of Marion L. Hall 33, Exhibit MLH-7 (8 Dec. 1977), *reprinted in* J.A. at 383, 415, 461-62. The ICC's determination of San Antonio's allocable portion of the costs is not challenged in this petition.

[60]*See San Antonio III,* 361 I.C.C. at 487; *San Antonio II,* 359 I.C.C. at 11. Because Rail Form A calculations were based on 1976 data, only coal-related investments for 1976 were excluded from input data. *See* Verified Statement of Marion L. Hall 21-22 (8 Dec. 1977), *reprinted in* J.A. at 383, 403-04.

[61]*San Antonio III,* 361 I.C.C. at 492.

costs.[62] We agree that the ICC's methodology results in something approaching a double count. Before explaining why we reach this conclusion, we pause to express our understanding of the proper relationship of the additive and Rail Form A.

As the Commission noted, Rail Form A is flexible enough to allow substitution of actual costs for predicted costs.[63] To substitute costs, however, one must *remove* as well as replace. For example, in allocating directly coal locomotive capital costs to coal shippers, the ICC first removed from Rail Form A *all* locomotive capital costs.[64] Logically, the ICC should have treated coal-related fixed plant investment costs the same way. In calculating San Antonio's rates, the ICC should have cleanly removed from Rail Form A all costs of the nature apportioned by the additive before including the additive. For instance, since the additive apportions costs for rail, ties, and rail anchors, all investments in rail, ties, and rail anchors should have been removed from Rail Form A in calculating San Antonio's share of Rail Form A investment costs. Labelling Rail Form A costs so adjusted "Rail Form A (—)," this process of substitution may be expressed mathematically as:

Costs = [Rail Form A (–)] + [fixed plant investment additive]

In this fashion, the coal shipper pays the actual cost of coal-related fixed plant investment instead of (and not in addition to) the Rail Form A amount reflecting the same type investment. Having

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[62]San Antonio concedes that there is "nothing economically unsound with the direct ascertainment of the new plant expense assignable to San Antonio's coal traffic for service cost purposes," but contends that it is error to include *both* the Rail Form A predictions *and* the fixed cost investment additive in the same calculation. That is, "you can use the Rail Form A method, *or* the direct method, or you could possibly make both computations and divide by 2, but it is improper to include two (2) estimates of the same expense in a single computation." Brief for San Antonio, Texas at 28 (emphasis in original).

[63]*San Antonio II*, 359 I.C.C. at 11.

[64]*See id.* at 21, 33–34, App. A.

elucidated a logical manner of using the additive, we now examine the Commission's disposition of the matter.

The Commission's reasoning and methodology respecting the additive are murky at best. It appears the Commission discerned that summing the unadjusted Rail Form A costs with the additive would double count investment costs, and therefore the Commission purported to exclude from Rail Form A[65] the specific investment amounts divided among the coal customers. While this exclusion is helpful,[66] it does not go far enough.[67] The Commission

[65]Our review of the record discloses that the ICC figures may not reflect an exclusion from Rail Form A averages of the incremental fixed plant investment at issue. Although the railroads did make such an exclusion in their rate submission, San Antonio did not. This is because San Antonio believed it appropriate to apportion the investment costs by using Rail Form A figures without including an additive. *See* Bureau of Accounts Section of Cost and Valuation, Analysis of Cost Data in Docket No. 36180, *San Antonio, Texas v. Burlington Northern, Inc.*, at 20 (1 May 1978), *reprinted in* J.A. at 2202. In calculating variable costs, *the Commission used San Antonio's figures, see San Antonio III,* 361 I.C.C. at 499, from which no exclusion had been made for the incremental investment. *See* Railroads' Petition for Administrative Review at 11 note (14 Nov. 1978), *reprinted in* J.A. at 2010 note. While this point is not present on appeal, the ICC's apparent use of figures not reflecting an exclusion of investment costs in conjunction with its claim that the exclusion has been made casts doubt on the validity of its conclusion that no double count has occurred.

[66]Had the expenses been entered in Rail Form A, then the railroads would recover costs for the identical items twice—first, through the additive, and second through the Rail Form A averages shared by all traffic.

[67]The Commission reasoned in its decision in *San Antonio II* and *III* that the existence in Rail Form A of investment costs *unrelated* to San Antonio traffic would result in a slight, though unquantifiable overstatement of investment costs. *See San Antonio III,* 361 I.C.C. at 487; *San Antonio II,* 359 I.C.C. at 11-12. In view of the overstatement problem, and its conclusion that the railroads had not shown that the entire amount of the additive was attributable to the San Antonio traffic, the ICC in *San Antonio II* reduced the additive by 30%. *See San Antonio II,* 359 I.C.C. at 12. The Commission reversed its position in *San Antonio III,* however finding that the amount of the additive was adequately

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should have excluded not only the specific coal-related investments allocated by the additive, but should have entirely removed from Rail Form A all other investment amounts of the same character.[48] By way of illustration, normally Rail Form A would include investment in ordinary rail as well as heavier coal-related rail, this total amount to be shared by all traffic. Because here the additive directly allocates the coal-related rail costs to San Antonio, in calculating its rates an adjustment must be made in Rail Form A. The ICC excluded from Rail Form A only those coal-related rail costs apportioned by the additive; it should have removed *all* rail investment costs to compute San Antonio's rate. As a result of this failure, both Rail Form A and the additive include amounts invested in rail. The additive includes costs for heavier coal-related rail; Rail Form A includes costs for all other rail in the system. The costs for other rail are not actual costs brought about by coal shipper use of such rail; they are predicted system average costs. The coal shipper, therefore, pays twice for the rail it uses: it pays the actual costs of heavier rail through the additive, and the system average predicted cost of rail via Rail Form A.

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supported and that the overstatement was not significant enough to warrant a cutback in the increment. *See San Antonio III*, 361 I.C.C. at 487, 489.

We are puzzled by the I.C.C.'s focus on inclusion of "unrelated" costs in Rail Form A. As we understand it, Rail Form A almost always includes investment unrelated to the particular movements whose costs are being computed. It is because of the difficulty of assigning particular investment costs to particular movements that the *shared* average cost concept of Rail Form A is used. If inclusion of "unrelated" investments in Rail Form A here results in an "overstatement," then that is inherent in Rail Form A and is neither exacerbated nor ameliorated by use of an additive. No one challenges use of the shared cost methodology of Rail Form A. Challenged is the use of Rail Form A and the additive to compute cost for the same categories of investments.

[48] We leave it to the ICC on remand (if it again chooses to use both Rail Form A and the additive to recover fixed plant investment costs) to define the categories of investment included in the additive and determine which investment costs presently entered into Rail Form A fall within these categories.

The Commission apparently believed this result justified because coal shippers to some extent use ordinary rail (and other fixed plant) whose costs are not included in the additive. This may be true. But noncoal traffic may use the heavier rail (and other *coal-related* fixed plant) whose costs are no longer included in Rail Form A. This means that, pursuant to the ICC's methodology, coal shippers pay *all* costs for the coal-related fixed plant *and* share in other fixed plant costs as if they were noncoal shippers,[69] while noncoal shippers pay *nothing* for their use of coal-related fixed plant and have their costs for fixed plant partially defrayed by coal shippers.

This amounts to cross-subsidization of noncoal shippers by coal shippers.[70] While cross-subsidization is legitimate when *differential rates* are set, it is impermissible to calculate *variable costs of service* so that one customer subsidizes another. Variable costs by definition are only the costs caused by the relevant service and should not include costs caused by other services. We recognize that costing is not a particularly exact science, but by occasioning

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[69]We understand the ICC's policy to be that once investment costs are apportioned by an additive, they may never be entered in Rail Form A. This means that the Commission excludes such coal-related expenses from Rail Form A when rates are calculated for noncoal as well as coal traffic. Thus, coal shippers are charged *the same Rail Form A costs as noncoal shippers*, in addition to the fixed plant investment additive.

[70]Even if no noncoal shippers used the coal-related investment San Antonio's costs would still be significantly overstated. This is so for the following reasons: Fixed plant investment costs are apportioned by Rail Form A principally as gross ton mile (GTM) costs. San Antonio is charged for each GTM by Rail Form A the same amount charged a noncoal shipper. That is, San Antonio pays for each GTM as if *all* its fixed plant were ordinary and noncoal-related. Through the additive, San Antonio is charged for each GTM as if *some* of its investment is coal-related. Using both methods together compels San Antonio to pay twice for the same coal-related investment—it pays once as if the investment is coal-related, and once as if noncoal-related. For example, for each stretch of heavy coal-related track, San Antonio pays twice, once as if noncoal-related, and once the actual (coal-related) cost.

cross-subsidization in variable cost calculation, the Commission's decision is not merely imprecise, but arbitrary and unreasonable."[71]

If on remand the Commission again elects to use Rail Form A and the additive in apportioning fixed plant investment costs, it must adjust Rail Form A costs as we have indicated to avoid the possibility of a double count of investment costs and crosssubsidization by San Antonio of other shippers' variable costs.

5. Roadway Maintenance Expenses

Another of the cost items contested in this proceeding is the amount necessary to compensate the carriers for maintaining the rail lines traversed by the San Antonio coal trains. In *San Antonio II* and *III*, the Commission allowed an expense based on the system average maintenance costs drawn from Rail Form A estimates. San Antonio argues that the ICC's reasons for rejecting its evidence—which allegedly established that the roadway maintenance expenses for the San Antonio traffic are lower on a per ton basis than the system average expenses—are arbitrary and capricious. We decline to upset the Commission's disposition of this cost item.

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[71]The Commission also maintains that the additive represents only the difference between actual and Rail Form A predicted costs, so that summing the additive and Rail Form A costs yields the actual investment costs, not a double count. We disagree. The additive was not computed by subtracting Rail Form A predicted costs from actual costs; rather, San Antonio's entire portion of coal-related investment costs was added to that predicted by Rail Form A.

Nor can the sum of the additive and Rail Form A costs even be said to approximate actual costs. As we have noted, the sum of both significantly overstates investment costs—whether that overstatement be labelled "cross subsidization" or a "double count."

If Rail Form A is adjusted as we suggest, however, then the sum of Rail Form A (—) and the additive yield a close approximation of actual costs. This is because the cost categories in Rail Form A (—) and the additive *by definition and construction are mutually exclusive.* Since the categories do not overlap, no longer will the shipper make contributions for the same cost category twice. In a sense, the additive is the "difference" between approximate actual costs and Rail Form A (—) costs.

After the Commission reopened the San Antonio proceeding in October 1977, San Antonio argued for a downward adjustment to system average costs for actual maintenance expenses incurred on the San Antonio movement.[72] San Antonio contended that while the absolute costs of maintaining the rail lines travelled by the San Antonio trains were indeed high, the actual per ton costs were lower than the system average costs because of the enormous volume of coal handled. In support of its position, San Antonio submitted actual maintenance expenses, furnished by the railroads, for the year 1977. Petitioner San Antonio had attempted to compel the carriers to produce maintenance expenses, by line segment, for a five-year period, but the Commission found this request too burdensome given the time constraints of the proceeding and ordered the railroads to produce only the expenses for the year 1977.[73]

In its decision in *San Antonio II* the ICC rejected San Antonio's proposed adjustment, stating that one year's data was inadequate to give an accurate indication of normalized expenditures on the San Antonio traffic.[74] In *San Antonio III*, the Commission again refused San Antonio's proposed adjustment to the roadway maintenance costs for the same reasons that it had

[72]The carriers claimed that the maintenance costs attributable to the San Antonio coal traffic were higher than the system average because of the greater physical stress associated with the heavy coal cars. In *San Antonio II* and *III* the Commission rejected the carriers' proposed adjustment as unsupported by any evidence of actual operating experience. The railroads do not challenge the Commission's findings here.

[73]*See San Antonio, Texas v. Burlington Northern, Inc.*, I.C.C. Docket No. 36180, at 3 (3 May 1978), *reprinted in* J.A. at 1761, 1763.

[74]*See San Antonio II*, 359 I.C.C. at 34, App. A. In addition, the Commission noted that the figures submitted by San Antonio represented only an estimate; San Antonio computed its per ton figure, intended to reflect actual maintenance expenses for the year 1977, by apportioning the 1977 expense figure on the basis of estimates of 1978 tonnages rather than the actual tonnages for the year 1977. *See id.* San Antonio defended its methodology claiming that it was unable to obtain the 1977 tonnage data from the carriers.

rejected this same adjustment in its prior decision.[75] This time, however, the ICC, acknowledging the magnitude of this particular cost item,[76] ordered the carriers to file status reports with the Commission divulging the actual maintenance costs incurred for each of the line segments for the years 1973 through 1978.[77]

San Antonio's quarrel with the Commission in this case is not with the Commission's finding *per se* that one year's data was not a reliable indicator of normalized maintenance expenditures—San Antonio's own cost expert noted that figures based on one year's expenditures did not constitute a representative sample and that a five-year data base would be more accurate.[78] Rather, San Antonio asserts that the Commission's rejection of its "computation as based on only one year's data, when that is all it was able to obtain from the railroads despite diligent and repeated efforts, borders upon the perverse."[79] Underlying San Antonio's complaint, then, is the Commission's denial of San Antonio's request to compel the railroads to produce data for each line segment for the years 1973 through 1978.[80]

There is no question that the maintenance cost item comprises a substantial portion of the entire costs of the service. San Antonio therefore should be permitted to obtain accurate information, if available, on this item. The Commission, however, has taken reasonable measures to provide San Antonio with the information it seeks: in *San Antonio III* the Commission ordered the carriers to

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[75]*See San Antonio III*, 361 I.C.C. at 489-90.

[76]San Antonio estimates that the maintenance expense, as amplified by the 7% additive, represents nearly $4.00 per ton of the entire rate. *See* Brief for Petitioner San Antonio, Texas at 34 n. 32.

[77]*See San Antonio III*, I.C.C. at 489-90 & 502-03, App. B.

[78]*See* San Antonio's Petition for Reconsideration at 5-6 (16 May 1978), *reprinted in* J.A. at 1785, 1790-91.

[79]Brief for Petitioner San Antonio, Texas at 34.

[80]*See San Antonio, Texas* v. *Burlington Northern, Inc.*, I.C.C. Docket No. 36180, at 3 (3 May 1978), *reprinted in* J.A. at 1761, 1763.

file status reports revealing maintenance data for each line segment for the years 1973 through 1978.[81] Thus it would appear pointless for this court to take any further step at this time. Once the carriers have produced the requested information, San Antonio presumably will be free to appear before the Commission to seek an adjustment if the figures so indicate.[82]

6. *Federal Taxes*

The final cost determination disputed by San Antonio is the Commission's treatment of federal taxes. In *San Antonio III* the Commission applied the statutory tax rate to adjust after-tax returns to the pretax level based on its conclusion that not only must the investment tax credit and actual taxes paid be reflected in the rate charged, but that deferred taxes should be accounted for as well. Thus the Commission computed the cost of service as if the carriers were using a straight-line method of depreciation even though the carriers actually are using an accelerated depreciation schedule. Under this method (normalization) the railroads receive the benefit of the tax deferral and the advantage of charging rates as if the higher tax actually had been paid.

San Antonio first claims that the Commission's election to normalize taxes for ratemaking purposes is unsupported by reasoned analysis.[83] We disagree.

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[81]*See San Antonio III*, 361 I.C.C. at 502–03, App. B.

[82]We note that in a further decision, not reviewed here, the Commission again stated that more refined data based on actual operating experience was desired and again ordered the carriers to file the status reports described in *San Antonio III*. *See San Antonio IV*, 362 I.C.C. 161, 164, 168 (1979).

[83]San Antonio does not dispute the Commission's election to account for actual taxes paid and the investment tax credit in the prescribed rate; its complaint lies only with the Commission's treatment of deferred taxes.

In *San Antonio III* the Commission succinctly stated its reason for electing to normalize taxes as follows:

> Our prescribed accounting system considers deferred taxes as part of the tax expense considered in the computation of net income. [*See* 49 C.F.R. § 1204, 1-12 (1978).] Deferred taxes, to a large extent, must eventually be paid and cannot be ignored as an element of the carriers' liability. In addition, allowing the carriers to retain the tax benefit of accelerated depreciation (the primary cause of deferred taxes) provides an incentive for investment.[84]

The Commission's approach also is in accord with its policy announced in *Ex Parte* No. 338, *Standards and Procedures for the Establishment of Adequate Railroad Revenue Levels.*[85] In that proceeding, the Commission noted its intent to adopt the statutory tax rate in railroad ratemaking proceedings, stating that "[w]hile there are some advantages of using the actual tax rate, use of the statutory tax rate will assure that accelerated depreciation and the investment tax credit remain an incentive to capital spending."[86] We therefore find the Commission's election to normalize taxes supported both by adequate reasoning and established policy.

San Antonio next argues that even if normalization is proper, the Commission neglected to deduct the deferred tax account from the net investment base prior to calculating the rate to be

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[84]*See San Antonio III*, 361 I.C.C. at 493. In *San Antonio II* the ICC indicated in a footnote that it was using an effective tax rate for the purpose of the ratemaking proceeding, *see San Antonio II*, 359 I.C.C. at 17 n. 32, but the cost computations appended to that decision corresponded to an approximation of the statutory tax rate. In its petition for administrative review of *San Antonio II*, San Antonio complained of this discrepancy, *see* San Antonio's Petition for Administrative Review at 3-5 (8 Dec. 1978), *reprinted in* J.A. at 2131, 2134-36, and in *San Antonio III* the Commission made clear its intent to normalize taxes.

[85]358 I.C.C. 844, *aff'd as modified*, 359 I.C.C. 270 (1978).

[86]*Id.* at 893-94.

assessed, contrary to the policy expressed in *Ex Parte* No. 338. The Commission responds by asserting only that its decision to normalize taxes for ratemaking purposes was proper. While we believe as we have indicated that it is permissible for the Commission to apply the statutory tax rate in its ratemaking proceeding, the Commission's response does not address the distinct issue of an adjustment to the net investment base for deferred taxes once normalization is elected.

As this court has recognized on more than one occasion, the principle of excluding a deferred tax reserve from the rate base, as such reserve comes into existence, is an essential component of an agency's election to normalize taxes for ratemaking purposes.[87] Otherwise the rate payer who has paid higher rates reflecting normalization accounting would be paying the carriers for earnings on the tax differential even though it was the rate payer who contributed the differential in the first place.

The Commission's own procedures set forth in *Ex Parte* No. 338 also underscore the necessity of subtracting the deferred tax reserve from the net investment base:

> We are cognizant of the fact that this treatment [normalization] confers a benefit on the carriers, in that they are receiving and retaining revenue which is not accounted as income. As indicated by some of the parties, the capital funds arising from deferred taxes have been contributed by the ratepayers rather than by investors in the company. Thus, it is appropriate to deduct the deferred tax account from the net investment rate base prior to any calculation of rate or return.[88]

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[87] *E. g., Public Sys. v. FERC*, 606 F.2d 973, 975-76 (D.C.Cir. 1979); *Memphis Light, Gas & Water Div. v. FPC*, 500 F.2d 798, 800 (D.C.Cir. 1974). *See* Warren, *Tax Accounting in Regulated Industries: Limitations on Rate Base Exclusions*, 31 Rutgers L.Rev. 187, 189-94 (1978).

[88] *Ex Parte* No. 338, *Standards and Procedures for the Establishment of Adequate Railroad Revenue Levels*, 358 I.C.C. 844, 894, *aff'd as modified*, 359 I.C.C. 270 (1978).

There is no indication in the record that the Commission adjusted the investment base to reflect the deferred tax reserve prior to calculating the rate for the San Antonio traffic. As the Commission totally ignored this point in its brief, we may only assume that the Commission also neglected to make this deduction. On remand therefore the Commission should make the required adjustment if in fact it has not already been made.[89]

C. *Revenue Adequacy—Mandate of the 4-R Act*

Section 205 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act) instructs the Commission to make a "continuing effort" to "assist [rail] carriers in attaining revenue levels" that are "adequate, under honest, economical, and efficient management, to cover total operating expenses . . . plus a reasonable and economic profit or return (or both) on capital employed in the business."[90] Such revenue levels should "provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, . . . cover the effects of inflation," and should ensure retention and

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[89]The carriers argue that because San Antonio's own witness calculated the cost of service by using the railroads' figure for the investment base, without making any adjustment for deferred taxes. San Antonio now should be precluded from seeking a modification in the investment base. We disagree. That portion of the witness's statement which discusses the Commission's treatment of federal taxes was devoted to arguing that the ICC should have used the effective rather than the statutory tax rate on the equity portion of capital. *See* Verified Statement of Leroy E. Peabody, Jr. (13 Feb. 1978), *reprinted in* J.A. at 947, 956-62. Because the calculations of the witness reflected the effective tax rate, *see id.* at 1058, he had no need to make any adjustment for deferred taxes.

[90]Pub.L. No. 94-210, § 205.90 Stat. 39, 41, *as amended by* Pub.L. No. 95-473. 92 Stat. 1373 (1978) (codified at 49 U.S.C.A. § 10704(a)(2) (West Supp. 1978)). Section 205 originally was added as § 15a(4) of the Interstate Commerce Act, 49 U.S.C. § 15a(4) (1976), and is now revised and codified at 49 U.S.C.A. § 10704(a)(2) (West Supp. 1978).

attraction of capital "in amounts adequate to provide a sound transportation system in the United States."[91]

To effectuate this statutory mandate, the Commission in *San Antonio III* included in its rate prescription a 10.6% return on investment equal to the carriers' cost of capital plus a 7% increment above full costs (including the cost of capital figure). Having concluded our review of the Commission's cost findings, we now must assess the Commission's reasons for selecting first the cost of capital figure and then the 7% additive as revenue need factors.

1. *Reliance on Cost of Capital Figure*

In prescribing the maximum reasonable rate in *San Antonio II* the ICC first allowed a 10.2% rate of return on investment equal to the carriers' overall cost of capital.[92] In *San Antonio III*, the Commission permitted a higher rate of return on investment to coincide with its findings in *Ex Parte* No. 353, *Adequacy of Railroad Revenue*,[93] that the weighted cost of capital for the railroads currently equalled 10.6%.[94] San Antonio objects to the Commission's decision to rely solely on the rate of return standard, arguing that the Commission's own regulations and decisions obligate it to consider other financial criteria, in particular a funds flow analysis, in arriving at a determination of revenue adequacy. The Commission concedes that other financial indicia "may be appropriate" to determine revenue adequacy in the future but contends that its approach in *San Antonio II and III* is a reasonable, interim one until more precise standards can be developed.

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[91]49 U.S.C.A. § 10704(a)(2)(A), (B) (West Supp. 1978).

[92]*San Antonio II*, 359 I.C.C. at 17. This figure reflected an embedded debt cost of 8.1%, an equity cost of 12%, with a capital structure of 35% debt and 65% equity.

[93](5 Dec. 1978), *reprinted in* J.A., Tab 5.

[94]*San Antonio III*, 361 I.C.C. at 491. This figure is based on a 13% cost of equity capital, a 7.0% cost of embedded debt, with a capital structure of 40% debt and 60% equity.

A brief review of the Commission's regulations and revenue adequacy proceedings demonstrates that the Commission has eschewed sole reliance on a cost of capital figure for assessing the revenue needs of the carriers. While it is not our intent or purpose to require the Commission to choose one methodology over another, we believe that further consideration of this issue by the Commission is appropriate.

On 31 January 1978 the Commission promulgated *Ex Parte* No. 338, *Standards and Procedures for the Establishment of Adequate Railroad Revenue Levels.*[95] The notice of proposed rulemaking suggested that a determination of the adequacy of railroad revenues would be derived from a consideration of the following: (1) whether such revenues provide a return on net investment equal to the carriers' cost of capital, (2) whether such revenues enable the carriers to maintain financial ratios indicative of a sound financial condition, and (3) whether such revenues make possible a sufficient flow of funds to allow the railroads' capital spending requirements to be met.[96] In its decision in *Ex Parte* No. 338, however, the Commission stated that because a funds flow approach was still in a developmental stage,[97] it was unable to determine at that time how these various financial indicia would coalesce to indicate the revenue needs of the carriers and which, if any, measure would predominate. It did assert that a return on net investment equal to the carriers' cost of capital was one criterion to be considered in ascertaining revenue adequacy but emphasized that it would not place "sole reliance on this measure."[98]

[95]358 I.C.C. 844, *aff'd as modified*, 359 I.C.C. 270 (1978).

[96]*See id.* at 845, 856.

[97]A funds flow model is intended to project the needed capital outlays and other fund requirements of the railroads, to determine the amount of funds available to them from operations and capital sources, and to predict the amount by which the available funds will fall short of the projected requirements. The dollar amount of this shortfall is added to the projected revenue level to find the amount of revenue needed, and this figure is then translated into a percentage return on net investment. *See id.* at 859.

[98]*Id.* at 858.

Shortly after the issuance of *Ex Parte* No. 338, the Commission adopted regulations pertaining to the procedures and standards to be followed in establishing adequate revenue levels for the railroads.[99] Section 1109.25 of the Commission's rules provides that the ICC shall make a yearly determination of revenue adequacy for Class I railroads on a national, district, and individual basis. That section specifically directs that such determinations shall be conducted upon consideration of "all pertinent financial indicators, including a rate of return on net investment equal to the cost of capital, other financial ratios, and the flow of funds . . . [;] and other evidence as to ability to make needed investment."[100]

The first proceeding to be conducted under the revenue adequacy regulations was *Ex Parte* No. 353, *Adequacy of Railroad Revenue,* issued on 5 December 1978.[101] The Commission's findings in that proceeding were limited to settling upon 10.6% as the overall cost of capital for use as a reference in judging returns on net investment. The ICC repeated, however, that "a rate of return on net investment equal to the cost of capital is only one of several factors to be considered in determinations of overall revenue adequacy" and concluded that "[t]he amount of weight accorded to tnis factor, and conclusions derived from consideration of other factors, are matters to be discussed in [a] subsequent decision."[102]

Thus far the Commission has issued no subsequent decision to deal with these issues. In the absence of other developed financial criteria, the Commission in *San Antonio III* included within the

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[99]*See* 43 Fed.Reg. 5836 (1978) (codified in 49 C.F.R. § 1109.25).

[100]49 C.F.R. § 1109.25(a)(1), (2) (1979). The regulation directs the Commission, *inter alia,* to publish on or before 30 June of each year a "funds flow projection for comment by participants." *Id.* § 1109.25(b)(3).

[101]*See* J.A., Tab 5.

[102]*Id.* at 40.

prescribed rate a 10.6% rate of return on capital to meet the carriers' revenue requirements.[103]

We appreciate the Commission's reasons for relying on the cost of capital criterion. Nevertheless, considerable time has elapsed since the ICC last indicated that it would undertake an analysis of other criteria to be applied in determining the overall revenue needs of the railroads, and presumably the Commission has progressed somewhat to that end. Given the mandate of *Ex Parte* No. 353, *Ex Parte* No. 338, and the rules promulgated thereunder,[104] we think that the Commission on remand should reassess the revenue requirements of the carriers using other appropriate financial measures, to the extent that these have been refined sufficiently, in addition to the cost of capital indicium.[105] We do

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[103]The Commission determined that the carriers' rates of return were low. *See San Antonio III*, 361 I.C.C. at 496; *San Antonio II*, 359 I.C.C. at 14. Indeed the railroads submitted evidence that their rates of return on net investment hovered around 2%. *See* Verified Statement of Bruce G. McPhee (6 Dec. 1977), *reprinted* in J.A. at 279.

[104]San Antonio also claims that the statutory language and the relevant portions of the legislative history of the 4–R Act indicate that other financial techniques, in particular a funds flow analysis, must be used to determine whether railroad revenues are adequate. While section 205 of the 4–R Act directs that revenue levels must "provide a flow of net income" "adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, [and] permit the raising of needed equity capital . . .," 49 U.S.C.A. § 10704(a)(2) (West Supp.1978), that language specifies not at all the exact methodology that the Commission shall use in accomplishing this mandate. Likewise, although the relevant portion of the Senate Report cited by San Antonio does indicate that the Commission should not focus solely on a rate of return analysis but instead should adopt a prospective view of carrier revenue needs, it does not prescribe specific standards by which to determine the adequacy of revenue levels. Instead, the report states only that "the Commission will be expected to utilize the most modern financial analysis techniques available." S.Rep. No. 499, 94th Cong., 1st Sess. 52 (1975), U.S.Code Cong. & Admin.News 1976, pp. 14, 66.

[105]We note that San Antonio presented its own projections in *San Antonio II* of the funds necessary to meet the railroads' revenue require-

(Footnote continued on next page.)

not mean to suggest a view as to the exact means that the Commission shall use in ascertaining the revenue needs of the railroads—that is not our function. Instead, our concern here is limited to ensuring that the Commission follows its own published standards and regulations.[106]

2. *Seven Percent Additive Above Fully Allocated Costs*

To assist the carriers in attaining adequate revenue levels in accord with the mandate of the 4-R Act, the Commission in *San Antonio III* also determined that a 7% increment above fully allocated costs (including the 10.6% rate of return on capital) was necessary. This conclusion was based on the theory of differential pricing, which postulates that rates on some services must be set at levels higher than full costs to compensate for those services on which the railroads are required to price below full costs to remain competitive.

(Footnote continued from preceding page.)
methods, *see, e. g.*, Verified Statement of George H. Borts (13 Feb. 1978), *reprinted in* J.A. at 1177, 1191-98, and in neither *San Antonio II* nor *San Antonio III* did the Commission even comment on these figures. We think that on remand the Commission at least should consider San Antonio's projections.

[106]The railroads assert that San Antonio's actual grievance is that the Commission has not yet completed a funds flow analysis, which it indicated in *Ex Parte* No. 353 that it would undertake. The carriers claim that because San Antonio never petitioned to review the Commission's decision rendered in *Ex Parte* No. 353, it is now precluded from challenging the ICC's failure to use a funds flow analysis in the San Antonio ratemaking. The short answer to the carriers' objection is that San Antonio had no need to challenge the Commission's decision in *Ex Parte* No. 353 concerning the standards to be used in judging revenue adequacy. The Commission specifically stated in that proceeding that the cost of capital criterion was only one of several factors to be considered in determining overall revenue adequacy. *See, e. g.*, note 102 *supra* and accompanying text. In the San Antonio ratemaking proceeding, the Commission disregarded this position as well as its decision in *Ex Parte* No. 338 and the regulations promulgated thereunder.

The Commission cautioned that in the application of this theory the railroads should not be permitted to recover their entire shortfall by extracting monopoly profits from captive shippers. Stating that no "simple formula" existed for judging the extent to which some shippers should subsidize others in the interest of producing a financially viable rail system,"[107] the Commission asserted that before it would impose a "substantial burden on some shippers," the railroads would be required to submit data on the following:

> (1) specific identification of the traffic that must be subsidized by other traffic and the reason why rates cannot be increased on that traffic; (2) the extent to which the railroads provide service on unprofitable branch lines and the reason(s) why such service cannot be made profitable or abandoned; (3) identification of commodities other than coal which could also make substantial contributions to the railroads' system revenue needs; and (4) identification and quantification of excess capacity on a carrier's system.[108]

Until the railroads could demonstrate that they were unable to increase revenues on competitive traffic, the Commission further asserted, it would "be reluctant to approve or prescribe rates which are significantly higher than fully allocated cost[s]."[109]

Apparently concluding that the contemplated additive did not fall within the latter category, the Commission, without benefit of the data identified above, set the San Antonio rate at seven percent above fully allocated costs. Admitting that this choice depended on no more than a "policy judgment," the Commission nonetheless asserted that its approach in the San Antonio proceeding was a reasonable measure pending the conclusion of *Ex Parte* No. 347, *Western Coal Investigation—Guidelines for*

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[107] *San Antonio III*, 361 I.C.C. at 495–96.

[108] *Id.* at 496.

[109] *Id.*

Railroad Rate Structure, which presumably would lead to the adoption of more precise guidelines.[110] Two Commissioners dissented to what one termed the adoption of a "seven percent solution" as plainly lacking in reasoned analysis. All of the parties to this case oppose the Commission's so-called seven percent solution for various reasons. Briefly, San Antonio and the State of Texas attack the Commission's whole theory of differential pricing, contending that the ICC may not require a particular movement to subsidize other traffic.[111] Expanding on this notion, Texas also asserts that the Commission's determination to require the San Antonio service to subsidize other traffic violates section 10741 of the Interstate Commerce Act, which proscribes unreasonable discrimination against particular regions or types of traffic.[112] For their part the carriers complain that the prescribed rate[113] is lower than rates approved by the Commission on comparable services prior to the passage of the 4-R Act.[114] With the enactment of that Act, the carriers assert, Congress intended the railroads to have greater, rather than less, flexibility in setting rates

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[110]*See id.*

[111]This claim is based on their theory that differential pricing may only be applied to the allocation of fixed "common" costs—a contention that is completely wrongheaded. By definition, fixed costs are not associated with any particular traffic. *See American Commercial Lines v. L&N R.R.*, 392 U.S. 571, 586 nn. 14 & 16, 88 S.Ct. 2105, 2113 nn. 14 & 16, 20 L.Ed.2d 1289 (1968). San Antonio also claims in the alternative that before the ICC may impose a subsidization burden it is required to make a specific finding concerning the level of revenues necessary to achieve "revenue adequacy." *See* note 122 *infra* and accompanying text.

[112]*See* 49 U.S.C. § 10741 (West Supp.1978). *See* note 116 *infra* and accompanying text.

[113]The rate set by the Commission with the 7% increment is equivalent to 162% of variable costs.

[114]The carriers cite cases decided prior to the enactment of the 4-R Act in which the Commission permitted the railroads to charge rates in excess of 200% of variable costs. *See* Brief of Railroad Petitioners-Intervenors at 19 n.12. The rate advocated by the railroads is equal to 178% of variable costs; the carriers claim that this figure is well within the zone of the maximum reasonable rates.

to permit a revitalization of the railway system, and the imposition of a seven percent "ceiling" above full costs thereby frustrates congressional intent.[115] The Department of Justice complains that the Commission's decision fails to indicate how the adoption of a seven percent additive comports with both the national policy favoring conversion to coal as a fuel source and with the Commission's own reservation concerning the extent to which captive shippers should subsidize other traffic.

Uniting these various arguments is the common objection that the Commission's decision is arbitrary and capricious in that it provides no defensible rationale for the inclusion of the seven percent increment. We base our conclusion to set aside the Commission's action on precisely this ground.

As this court acknowledged in *Houston Lighting & Power Co. v. United States*, differential pricing is "pertinent to the objective [set forth in the 4–R Act] of providing an adequate overall level of earnings."[116] Even though differential pricing thus may be a

[115]*See, e.g.*, Pub.L.No.94–210, § 101(b)(3), 90 Stat. 31, 33 (1976) (4–R Act enunciates congressional policy to "permit railroads greater freedom to raise or lower rates for rail services in *competitive* markets") (emphasis added). We note that the San Antonio market is not a competitive one. *See* text accompanying note 122 *infra*.

[116]606 F.2d 1131, 1148 (D.C.Cir.1979), *cert. denied*, 444 U.S. 1073, 100 S.Ct. 1019, 62 L.Ed.2d 755 (1980). Texas' claim that any cross-subsidization of traffic violates section 10741 of the Interstate Commerce Act is thus at odds with our conclusion in *Houston Lighting* that differential pricing may play a role in railroad ratemaking. That does not dispose, however, of the argument that the choice of a specific increment above full costs may work an unreasonable burden on the San Antonio traffic and thus constitute a violation of section 10741. The discrimination argument was not addressed directly by the Commission. It would be appropriate therefore for this court not to attempt to resolve it here, even if we had an adequate record to do so. In addition, Texas' objection is merely one aspect of the larger concern that the seven percent solution is unsupported by any rationale or evidence. Texas' interests will be adequately protected when the Commission on remand is required to explain more fully its reasons for selecting any increment above fully allocated costs.

legitimate criterion for the ICC to consider in the San Antonio ratemaking proceeding, the Commission still must provide adequate justification for its choice of a particular increment above fully allocated costs. In *San Antonio III*, however, the ICC did no more than make the general assertion that it could not find that the railroads had achieved revenue adequacy. There is nothing in the record in the way of findings, evidence, or rationale to support the seven percent solution or any percentage solution. The Commission's general allusion to the need to consider the revenue requirements of the carriers and the economics of differential pricing is so broad as to be meaningless as a standard—this rationale could be put forth just as readily in an attempt to justify a 1%, 21%, 45%, or even a 99% additive. The Commission here defends its action on the ground that adoption of the appropriate additive involves a policy judgment that is not susceptible to precise quantification. Concededly the problem is a difficult one, but that does not excuse the Commission from articulating "fully and carefully the methods by which, and the purposes for which, it has chosen to act."[117]

In *San Antonio III*, the Commission listed four criteria that it stated would be used to assess the extent to which particular movements should be required to subsidize other services,[118] but the ICC then completely ignored this standard in its indiscriminate selection of the seven percent additive. Apparently the Commission assumed that because its solution assertedly was a temporary one, it was relieved from its responsibility to follow any standard whatsoever.[119] That notion provides little comfort to

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[117] *Permian Basin Area Rate Cases*, 390 U.S. 747, 792, 88 S.Ct. 1344, 1373, 20 L.Ed.2d 312 (1968).

[118] *See* note 108 *supra* and accompanying text.

[119] We note the skepticism expressed by all parties that the Commission's approach is a temporary one. The Commission has employed the 7% factor in several decisions involving Western coal rates subsequent to *San Antonio*. *See, e.g.*, Brief of Railroad Petitioners-Intervenors at 25 n.18.

those affected by the ratemaking proceeding and is irreconcilable with established principles of reasoned decisionmaking.

Finally, the 4-R Act evinces a congressional policy to "balance the needs of carriers, shippers, and the public."[120] "[N]either the interest of electric consumers in lower rates nor that of the public in coal conversion dictates that the railroads must receive compensation for their services inadequate to maintain financial soundness";[121] still, the Commission's decision must reflect adequate consideration of all the pertinent interests. As should be obvious from our discussion, the Commission has not met this obligation. From the carriers' standpoint, the ICC made no effort to determine whether the revenues that would be produced by a seven percent additive would be adequate. From the shipper's and ultimately the consumer's standpoint, the Commission professed concern that the railroads should not "make up their entire shortfall by extracting monopoly profits from captive shippers,"[122] but then failed to explain how its choice of a seven percent additive was consistent with that concern. It is undisputed that San Antonio falls into the category of a "captive shipper": it is locked into long-term contracts for the shipment of coal with no alternative means at present of transporting this coal. And with respect to the public interest in coal conversion, although the Commission in *San Antonio II* discussed the effect on national energy policy of including a return on equity capital as a revenue need factor, in *San Antonio III* it neglected to discuss what effect the imposition of an additional seven percent subsidy would have. On remand, then, the Commission is directed to explain more fully its reasons for selecting a particular increment, if any, above fully allocated costs, making sure that its decision is based on a thorough analysis of the relevant interests.

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[120]Pub.L.No.94-210, § 101(b)(1), 90 Stat. 31, 33 (1976).

[121]*Houston Lighting & Power Co. v. United States*, 606F.2d 1131, 1149 (D.C.Cir. 1979), *cert. denied*, 444 U.S. 1073, 100 S.Ct. 1019, 62 L.Ed.2d 755 (1980).

[122]*San Antonio III*, 316 I.C.C. at 495.

D. *Environmental Implications*

Lastly, the State of Texas argues that the Commission was required by the National Environmental Policy Act (NEPA) to prepare a detailed environmental impact statement (EIS) before approving the rate increases on the San Antonio traffic.[123] Texas's major concern in this respect is that the Commission's decisions in *San Antonio II* and *III* will not only result in higher electricity rates for San Antonio area customers, but that it will also set the pattern for future rate increases which may inhibit subsequent conversion to coal by the Texas utility companies.

Although in *San Antonio II* the Commission first characterized the effect predicted by the State of Texas as an economic impact not within the scope of NEPA, the Commission nevertheless assured petitioner that the environmental consequences of its rate-making policy would be considered in its proceeding in *Ex Parte* No. 347, *Western Coal Investigation—Guidelines for Railroad Rate Structure.*[124] On appeal Texas claims that the challenged rate should be set aside until an environmental impact statement is completed.

As a product of its investigation of Western coal rates in *Ex Parte* No. 347, the Commission already has issued a draft environmental impact statement to which both the State of Texas and the carriers have filed extensive critical comments.[125] In light of this fact, no purpose would be served by ordering the Commission to duplicate its efforts by exploring these questions again in the context of the San Antonio rate-making proceeding.[126] Instead it

[123] *See* 42 U.S.C. § 4332(2)(C) (1976).

[124] *See San Antonio II*, 359 I.C.C. at 18 & n.33.

[125] *See Ex Parte* No. 347, *Western Coal Investigation—Guidelines for Railroad Rate Structure, Draft Environmental Impact Statement.*

[126] *Cf. Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 324–25, 95 S.Ct. 2336, 2357–58, 45 L.Ed.2d 191 (1975) (*SCRAP II*) (in general revenue proceeding, permissible to defer preparation of detailed environmental impact statement to "more appropriate proceeding").

suffices that the Commission on remand integrate the tentative conclusions derived from the comments filed to the draft EIS into its consideration of the maximum reasonable rate to be established for the San Antonio coal traffic.

III. CONCLUSION

With the foregoing guides to the Commission, we vacate the orders before us and remand for proceedings not inconsistent with this opinion.

So ordered.

APPENDIX C

31168

INTERSTATE COMMERCE COMMISSION

No. 36180

SAN ANTONIO, TEXAS ACTING BY AND THROUGH ITS CITY PUBLIC SERVICE BOARD v. BURLINGTON NORTHERN, INC., ET AL

No. 36180

SAN ANTONIO, TEXAS ACTING BY AND THROUGH ITS CITY PUBLIC SERVICE BOARD v. BURLINGTON NORTHERN, INC., ET AL[1]

Decided May 23, 1979

Upon petitions for administrative review and administrative appeal of decision issued in this reopened proceeding on October 25, 1978, prior conclusions affirmed, with modifications. Maximum reasonable rate of $17.23 per net ton prescribed.

Curtis H. Berg, Charles W. Burkett, R. Eden Martin, Richard J. Metgzer, and *Howard J. Trienens* for defendant railroads.

C. Michael Loftus, Arthur Von Rosenberg, and *William L. Slover* for complainant City Public Service Board of San Antonio, TX.

John T. Hill, David Hughes, and *Pete Schenkkan* for the State of Texas.

Marjorie Rosenthal Bloom, Lynn R. Colemen, Robert M. Hallman, and *Cameron R. Graham* for United States Department of Energy.

DECISION

BY THE COMMISSION:

BACKGROUND SUMMARY

On October 25, 1978, the Commission issued a decision in this reopened proceeding, prescribing a maximum reasonable rate of $16.12 per net ton for transportation of coal by defendant railroads to complainant's electric power plant. San Antonio thereafter filed: (1) a petition for clarification of the computation of the $16.12 rate; (2) a petition to strike the tariff implementing the rate; and (3) a petition to stay the October 25 decision.

In a decision served November 29, 1978, Chairman O'Neal denied San Antonio's petition for a stay. In a second decision served

[1]The Colorado and Southern Ry. Co., Fort Worth and Denver Ry. Co., and Southern Pacific Transportation Co.

November 29, the Commission denied San Antonio's petition for clarification, finding that San Antonio's allegations of computational error were without merit. San Antonio's petition to reject the tariff was also denied.

In addition to those petitions which have already been disposed of, parties to the reopened proceeding have filed various other post-decision petitions for relief which will be considered in this decision. They include the following: (1) the State of Texas' administrative appeal, (2) San Antonio's petition for oral argument, petition for administrative review, and administrative appeal, (3) defendant railroads' petition for administrative review, and (4) the United States Department of Energy's (DOE) petition for clarification.

The contentions made and the relief sought in the various petitions, appeals, and replies thereto are discussed below in the context of the major issues that have arisen. Based upon our evaluation of the contentions of the parties and our review of the record, we have modified our conclusions regarding certain issues. As a result of those modifications, we find that a rate of $17.23 constitutes a maximum reasonable rate on this traffic, subject to the general increase approved in *Increased Frt. Rates & Charges, Nationwide—8 Percent,* 359 I.C.C. 740 (1978).

Evidence of Actual Operating Experience

At page 9 of the October 25 decision, we were critical of the defendant railroads for failing to submit evidence of actual operating experience as requested in the order reopening this proceeding.[2] We announced that any uncertainties resulting from that failure should be resolved against defendants and indicated that although the evidence might otherwise have justified a rate of $16.62, the defendants failure of proof in this regard only permitted prescription of a maximum reasonable rate of $16.12.

In their petition for administrative review, the defendants challenge our conclusion regarding the evidentiary failure. They assert that the evidence submitted by defendants in the proceeding as to actual operations is at least as complete and detailed as any record in any rate case ever decided by the Commission. A detailed list of "evidence of actual operations" submitted by the railroads is attached to the railroads' pleading.

In reply, San Antonio contends that that data is nothing more than basic information known to all parties. It argues that the railroads'

[2] Order of October 27, 1977.

the reasons discussed below, we have, therefore, altered our conclusion with respect to the inclusion of fixed plant investment and fair rate of return.

The contention of San Antonio and the State of Texas that the defendants' evidentiary deficiencies should have precluded prescription of a higher rate on the reopened record is without merit. Our criticism of the defendants' evidence does not compel us to disregard this reopened record. As noted above, we accepted complainant's lower cost evidence on most disputed items. Moreover, in the order reopening this proceeding, we sought evidence on the cost of service (including new evidence based on actual operating experience) and rate comparisons. In addition, the parties were invited to "separately address the question of a fair, reasonable, and economic profit or return."[4] The defendants' failure to satisfy the Commission with respect to particular evidence of actual experience was not a condition precedent to our evaluation of the return question.

Fixed Plant Investment

In computing the defendants' cost of providing the service to San Antonio, we accepted defendants contention that a portion of their claimed fixed plant investment cost should be allocated directly to the movement rather than using the Rail Form A historic system-average cost procedures exclusively. Although including such an additive in cost would have resulted in a $.42 increase in the cost (based on the 10.2 percent cost of capital found reasonable in our prior decision), that amount was cut back by 30 percent (to $.29) because defendants had not shown through details of actual operations that the entire amount of the claimed additional investment is attributable to this traffic[5] and because a slight overstatement would result if that procedure were followed.

In its appeal, San Antonio challenges the inclusion of this fixed plant investment additive. San Antonio's position is that Rail Form

[4] Order of October 27, 1977, at p. 2. It should be noted that the parties were cautioned that in this proceeding the Commission was not prepared to make findings and receive evidence on revenue adequacy guidelines that were then (as of October 27, 1977), under consideration in another rulemaking proceeding. That proceeding has now been completed. Ex Parte No. 338, *Establishment of Adequate Railroad Revenue Levels*, 358 I.C.C. 844 (1978), modified in 359 I.C.C. 270 (1978).

[5] In our prior decision, we stated at p. 15: Since respondents have failed to provide details of actual operations, including a greater indication of the extent to which the incremental fixed plant investments will benefit other current and projected new traffic moving along the same lines, defendants have not shown that the entire amount of the claimed additional investment is attributable to this traffic.

claim that this coal movement resulted in higher than Rail Form A average costs in many categories is unsupported because of lack of evidence of actual operating experience.

San Antonio and the State of Texas point out that the defendant railroads had the burden of proof in this reopened proceeding. Both contend that in view of the Commission's finding that the defendant railroads had failed to provide adequate evidence of actual operations, the Commission should have allowed nothing over the existing rate since the railroads wholly failed to meet their burden of proof.

Conclusions.—We recognize that defendants did provide certain evidence based on operating experience[3] and made numerous adjustments to average Rail Form A unit costs in presenting their cost evidence. However, only one internal adjustment to Rail Form A costs (crew wage expense) was based on a special study of the issue traffic. Other adjustments were based on studies submitted in previous proceedings and information published by the Association of American Railroads (AAR). The adjustments made by defendants were found to be based on unacceptable data or methodologies, or otherwise not representative of the subject traffic with the exception of two items (fixed plant investment and loss and damage).

The particular deficiencies in the defendants' cost evidence were discussed in some detail in our analysis and restatement of the cost evidence in the October 25 decision. (See appendix A, pp 13-18.) As a consequence of those deficiencies, and in accordance with our conclusion that uncertainties should be resolved against defendants, we accepted complainant's lower cost evidence on most disputed items.

Certain disputed issues were also resolved against defendants on grounds that they had failed to provide evidence of actual operations. Specifically, our conclusions on the cost of fixed plant and our determination of a fair rate of return to the railroads were based, in part, on our finding regarding the defendants' evidentiary deficiencies. On reconsideration, we have determined that the *particular* evidentiary deficiencies discussed in the October 25 decision should not have affected our consideration of those other issues. For

[3] For example, defendants presented: (1) actual route and miles; (2) actual number of cars and trainloads per month; (3) actual round trip times; (4) actual en route switching times; (5) actual origin and destination switching; (6) actual crew wages; and (7) actual locomotives and cabooses used, with actual cost per unit. Some of the defendants' evidence on these items were rejected in our prior decision.

A variable cost finding procedures do in fact give recognition to the additional plant investment which is required to handle the increased traffic levels and that including an additional $.29 constituted error.

In its petition for administrative review, the defendants take issue only with the 30-percent cutback (from $.42-$.29) in the amount of fixed plant investment costs. It is their position that the Commission erred in concluding that the defendants failed to show that the additional investment was attributable to this traffic.

Defendants point to their cost evidence which included a portion of the cost of new investment in fixed plant for the years 1976 and 1977. Only a part of that 1976-77 investment claimed by the carriers, was allocated to San Antonio based upon tonnages to move over the line in question; the remainder is allocated to other coal traffic.

With respect to our statement that including the full amount of fixed plant investment would result in an overstatement—the second reason given for the 30-percent cutback—the defendants contend that the criticism is without merit. Defendants point out that the incremental plant capacity expansion expenses calculated directly were removed from Rail Form A averages in order to eliminate any double counting.

Finally, in its petition for clarification, the Department of Energy (DOE) requests an explanation of the data and methodology used in deriving the 30-percent reduction factor.

Conclusions.—San Antonio's arguments on appeal regarding this issue are the same that it has put forward throughout this proceeding. The Commission has included this fixed plant additive to recognize capital costs above and beyond those developed in the Rail Form A formula, which is predicated upon existing plant investment reported by the carriers. These capital costs result from the new construction and improvements to roadway which are required to accommodate the continuous operation of heavy-loaded coal unit trains. The additive is designed to compensate the carriers for those investments and thus more accurately reflect actual costs imposed by this service. The inclusion of additional fixed plant investment capital costs is consistent with the approach taken in our original rate prescription, with our treatment of this issue in subsequent coal cases[6], and the Court of Appeals' admonition that "the purpose of the 4R Act cannot be met unless the rates for a unit train

[6]*See, e.g., Incentive Rate on Coal—Cochise, Arizona*, 357 I.C.C. 683 (1977) (*Cochise*) and *Incentive Rate on Coal—Smithers Lake, Texas*, 358 I.C.C. 537 (1977) (*Smithers Lake*).

movement of this size and duration are structured to 'stand on their own wheels.' "[7] San Antonio's appeal on this issue is, therefore, denied.

With respect to the railroads' arguments concerning the 30-percent cutback on this item, it must be conceded that the 30-percent figure cannot be supported in terms of specific and quantifiable data. More importantly, upon reevaluation of the evidence of record on this issue, we conclude that defendants did adequately support the inclusion of a fixed plant investment additive to the extent of $.43.[8] The defendants demonstrated that the incremental fixed plant investment of which a portion was allocated to San Antonio, was caused solely by coal shippers which will be the principle beneficiaries of those investments and that the portion allocated to San Antonio was reasonable. However, to verify that all investments included in the carriers' evidence have actually been made and to ensure that those fixed plant costs have been properly allocated among unit-train coal shippers, we are requiring status reports to be filed by the carriers 6 months from the date of this decision. The data to be provided is described in appendix B.

With respect to our conclusion that following this methodology would somewhat overstate cost, the defendants misread our decision. Basically, the position here is that although failure to include a fixed plant increment in costing unit-train coal movements would *significantly understate* actual costs, the direct allocation of those cost would *slightly* (albeit unquantifiably) *overstate* costs. One reason why we do not believe that there is a significant overstatement is that defendants have excluded the incremental fixed plant investment from their Rail Form A cost calculations related exclusively to coal traffic. Although some remaining system investment is left in Rail Form A, such investment is spread over all service units and thus only a very small portion of the remaining investment is applied to this coal movement under defendants costing procedures. In addition the new traffic will use, to some extent, a portion of the carriers existing (as opposed to new or "incremental") fixed plant for which investment is already included in the Rail

[7] *Burlington Northern, Inc.* v. *United States*, 555 F. 2d 637, 647 (8th cir. 1977).

[8] The defendants presented evidence demonstrating that the capital costs for fixed plant investments related to this traffic for the years 1976 and 1977 amounted to $.46 (exhibit MLH-7). That computation was based on an 11-percent cost of capital. The $.03 difference here ($.43) reflects our use of a 10.6-percent cost of capital as the appropriate figure to be used in calculating a fair rate of return for the carriers. See discussion below at pages 491-92. In our prior decision, the amount of the fixed plant investment additive was based on a 10.2-percent cost of capital producing a $.42 figure. A detailed explanation of the calculations is set forth in appendix A.

Secondly, it must be pointed out that the evidence based on actual operations on this item (actual expense data for 1977) was simply too tenuous a basis on which to make adjustments to the system average cost indicated by Rail Form A and originally advocated by complainant.[9] While complainant is correct in its assertion that it sought more actual data in this item—data which might have better substantiated an adjustment to the system averages (either up or down)—our resolution of the issue at the discovery stage was based on our conclusion that complainant's demands for data were unreasonable.[10]

As indicated, we rejected complainant's adjustment on this item for a number of reasons in addition to the fact that 1 year's data was inadequate to determine what the appropriate average or normalized maintenance-of-way expense would be on the subject lines. First, complainant assigned costs to the San Antonio's traffic based on the percentage of San antonio's traffic tonnage to the total estimated gross tonnage moving over the lines during 1978. Thus, the only "actual" data were 1977 expenses. The tonnage allocation was an estimate. We concluded that this was too speculative a basis upon which to make such a major reduction to the system average cost as proposed by complainant.

In addition, complainant's methodology in arriving at the proposed reduction was based on a weighing of the average cost applicable to all traffic moving over the subject lines. It could not be determined how much maintenance expense was incurred soley from handling the subject traffic.

We affirm our original conclusion that the system average costs on maintenance of way were the best evidence of record and complainant's petition on this issue is denied. Nevertheless, we believe this particular item is of sufficient magnitude to require defendants to produce actual data which will demonstrate whether an adjustment to Rail Form A average costs is warranted. Therefore, in conjunction with the status reports to be filed regarding expenditures for fixed plant investment, we shall require the defendants to file data indicating the amount expended for freight

[9] Complainant subsequently revised its cost evidence to reflect the $1.38 reduction after receiving defendants responses to its interrogatories.

[10] See decisions served May 3 and July 13, 1978. Complainant sought maintenance-of-way data for the last 5 years and for 1977 by line segment. This information was not available to the railroads in the form requested and could only have been provided through a manual, record-by-record search of past transactions involving considerable time and expense. The information could not be furnished within the time limits imposed by the procedural framework of this case without imposing an oppressive burden on the carriers.

Form A average costs. Had the incremental investment related to the new coal traffic been included in Rail Form A as advocated by complainant, those investment costs would be spread out over all service units resulting in a disproportionate share being allocated to noncoal traffic. Thus the inclusion of a separate fixed plant investment additive in addition to Rail Form A cost would more closely reflect the true costs of this movement.

We do not believe that the slight overstatement, in and of itself, is a sufficient justification for the 30-percent cutback on this item. Our restatement of cost is revised to reflect a 5.43-percent additive, based on the 10.6-percent cost of capital figure found reasonable here (see discussion below, pages 489-97).

MAINTENANCE OF WAY

Based on actual expense data for the year 1977 supplied by the defendants, complainant San Antonio argues that system average cost should be reduced by $1.38 (below Rail Form A system average costs) on this particular item. We rejected this reduction and restated cost for this item based on system averages. Our rejection (discussed at pp. 18-19 of appendix A to the October 25 decision) was based on a number of factors, including the consideration that expense data for only 1 year was not sufficient to determine what the appropriate average or normalized maintenance-of-way expense would be on the subject lines.

San Antonio contends on appeal that our rejection of its adjustment to maintenance of way was in error because San Antonio was prevented from obtaining the necessary data to further substantiate the adjustment by the defendants' refusal to respond to interrogatories and the Commission's sanction of that refusal. San Antonio points out that it tried repeatedly during the discovery stage of this proceeding to get actual expenses on this item for 5 years. However, San Antonio argues, the Commission required only 1 year's data (1977) of the defendants (decision of May 3, 1978) and then based its rejection of San Antonio's adjustment on grounds that 1 year's data was insufficient.

Conclusions.—Several points of clarification are in order regarding the maintenance-of-way issue. First, it should be pointed out that defendants' *upward* adjustment of this item (above Rail Form A average costs) was also rejected in our original decision because, *inter alia*, it was not based on any demonstrated operating experience.

maintenance-of-way and structures expense, by line segments for the years 1973 through 1978. The data to be provided is described in appendix B.

FAIR RETURN

In our prior decision we stated that the rate level prescribed was based on computation of costs adjusted to reflect a 10.2-percent cost of capital as a revenue need factor.[11] As a mechanical matter, this was accomplished by substituting the higher, 10.2 cost of capital (on a pretax basis) for the lower embedded interest rates used in calculating the capital cost elements in Rail Form A (see appendix A). That same cost of capital figure was used in establishing the amount of fixed plant investment capital costs to be permitted. Through application of that cost of capital figure in the computation of the prescribed rate, we sought to provide the defendants with a fair rate of return on their investment at a level sufficient to compensate the capital providers commensurate with their business financial risks and to permit the raising of needed equity capital. We indicated that although the defendants' proposed 11-percent cost of capital figure did not appear unreasonable at first blush, that figure was reduced to 10.2 percent by rejecting defendants' higher equity capital cost estimates and substituting a 12-percent equity figure which was deemed more appropriate. Various reasons for that reduction were set forth, including the uncertainty resulting from the defendants' failure to submit evidence of actual costs and capital needs and their failure to address the issue of the apparently lesser degree of risk involved in handling the high-volume captive traffic.

In their petition for administrative review, the defendants contend that there is no basis for the finding that they had failed to support an overall after-tax cost of capital of at least 11 percent. DOE requests an explanation of the data and methodology used in deriving a 12-percent after-tax return on equity.

Conclusions.—On reconsideration, we have determined that our reduction in defendants' cost of capital figure, which was used to determine a revenue need factor and calculate the amount of fixed plant investment additive was not warranted.

With respect to our observation regarding the "uncertainty resulting from the carriers' failure to submit evidence of actual costs

[11] Decision of October 25, 1978 at p. 39. See discussion of "revenue need" questions at pages 492, 496-97.

and capital needs,"[12] we have now determined that the defendants' particular evidentiary failures as discussed above should not have affected our consideration of this issue. Moreover, our reexamination of the record indicates that defendants did, in fact, address the issue of risk as it relates to this traffic and railroad investment in general. Thus, in light of our reexamination of the record, we conclude that the reduction of the railroads' cost of equity capital to 12.0 percent was not adequately supported.

In our prior decision, we noted that our approach to various issues in this proceeding must be recognized as an interim one, pending our conclusions in the broader context of other ongoing investigations, including Ex Parte No. 353, *Adequacy of Railroad Revenue*, 361 I.C.C. 79 (1978). In our discussion of the cost of capital issue, we indicated that our findings might be subject to change in light of conclusions reached in that proceeding because of its comprehensive treatment of that specific issue.[13]

Decisions in Ex Parte No. 353 have now been issued. Based upon our evaluation of the financial data of 10 rail carriers of highest investment quality,[14] we concluded that the weighted cost of capital for the railroads is currently 10.6 percent, based on a 13-percent cost of equity capital, a 7.0-percent cost of embedded debt, and a 40-percent debt/60-percent equity capital structure mix. We further concluded that those findings could be applied in individual rate proceedings.[15] Because the record in that proceeding provided a much more comprehensive treatment of the cost of capital issue than was possible in this proceeding, we have decided to adopt the Ex Parte No. 353 findings in determining the proper cost of capital to be used in this proceeding for purposes of revenue need. Thus, in lieu of the 10.2-percent cost of capital figure used in our prior decision, we have used a figure of 10.6 percent (or 17.2 percent, on a pretax basis) in restating the defendants cost of capital for revenue adequacy purposes.

Upon reconsideration of the evidence presented by defendants and complainant we have restated the variable and fully allocated costs (including the fixed plant additive and the revenue need factor) shown on page 20 of appendix A to the prior decision to reflect: (1) elimination of the 30-percent reduction to the fixed plant investment additive, and (2) substitution of a 10.6-percent after-tax

[12] See decision of October 25, 1978, at p. 23.

[13] See decision of October 25, 1978, at p. 24, footnote 31.

[14] These include defendants Burlington Northern (of which the Colorado and Southern and Fort Worth and Denver are subsidiaries) and Southern Pacific.

[15] See Ex Parte No. 353, *supra*, decisions served December 5, 1978 and March 27, 1979.

cost of capital in lieu of 10.2 percent used in the prior decision. As noted previously herein, a statutory tax rate of 48 percent was used in pretaxing the 10.2-percent cost of capital. However, the new statutory tax rate of 46 percent which became effective January 1, 1979, has been used in pretaxing the 10.6-percent after-tax cost of capital used here. That tax rate difference accounts for the slightly lower pretax level (17.2 as opposed to 17.89) used herein. Based on the above changes, the fully allocated costs (including the additive and revenue need factor) shown on page 20 of appendix A to the prior decision are restated to $15.48 per net ton, as follows:

	Per ton
1. Rail Form A variable costs	$9.79
2. Fully allocated costs	12.36
3. Filed plant investment additive	.43
4. Total full allocated costs including additive	12.79
5. Adjustment to Rail Form A cost to reflect a 10.6-percent revenue need factor in lieu of 10.2 percent.	[1]2.69
6. Total full allocated costs including additive and revenue need.	15.48

[1]This figure represents the difference between the $1.25 per ton based on embedded debt rates and $3.94 per ton which represents that total cost of capital based on 10.6-percent after-tax and 17.2 percent before tax.

The reason why the $2.69 per ton figure based on 10.6 percent is lower than the $2.85 per ton figure shown in the prior decision, which was based on 10.2 percent, is accounted for by the different tax rates used. That is, we have used the new statutory tax rate of 46 percent whereas in the prior decision, a statutory tax rate of 48 percent was employed. Consequently, even though a higher cost of capital (10.6 in lieu of 10.2) is now being used, the increase in this rate (4/10 of 1 percentage point) is more than offset by the decrease in the tax from 48 to 46 percent (2 whole percentage points). When 10.2 percent is pretaxed on the basis of 48 percent, the pretax cost of capital is 17.89 percent. In comparison, when the higher 10.6 percent is pretaxed on the basis of 46 percent, the pretax rate is slightly less at 17.2 percent. The calculation of both the $2.69 and $2.85 figures are detailed in appendix A attached.

When the $15.48 figure shown in the above table is increased by 4 percent to give effect to the general rate increase approved in Ex Parte No. 349, *Increased Freight Rates and Charges, 1978, Nationwide,* the maximum reasonable rate at the revenue need level is $16.10. A detailed computation of the rate at that level is set forth in appendix A.

prescribed rate. Substantially the same procedure has been followed here with respect to the 10.6-percent cost of capital figure which we now find to be reasonable.

The 10.6-percent cost of capital developed by the Commission in Ex Parte No. 353, *supra*, was calculated on the basis of a 7-percent cost of debt capital, 13-percent cost of equity capital, and a capital structure mix of 40-percent debt and 60-percent equity. Conversion of this 10.6-percent rate to a pretax basis is accomplished by pretaxing the cost of equity capital and reweighting the cost components as follows:

	Capital structure mix (1)	Cost rate (2)	Cost rate adjusted (3)	Weighted cost rate col. 1 x col. 3
		Percent	*Percent*	*Percent*
Debt	.40	7	7	2.8
Equity	.60	13	[1]24	14.4
				17.2

[1]This pretax rate was derived by dividing 13 percent (col. (2)) by 1 minus the current statutory tax rate of 46 percent.

With respect to our treatment of taxes, it should be made clear that in this context, we are finding the cost of capital not as a variable cost but as a component of a maximum rate prescription.[17] In deciding the appropriate tax rate to use for that purpose, we have considered three possible factors in the carriers' overall tax liability—actual taxes, deferred taxes, and the investment tax credit.

There is no question that actual taxes must be recognized as a valid business expense. We believe that the provision for deferred taxes should also be recognized. Our prescribed accounting system considers deferred taxes as part of the tax expense considered in the computation of net income. Deferred taxes, to a large extent, must eventually be paid and cannot be ignored as an element of the carriers' liability. In addition, allowing the carriers to retain the tax benefit of accelerated depreciation (the primary cause of deferred taxes) provides an incentive for investment.

[17]We are currently considering the proper treatment of taxes in the computation of variable costs in Ex Parte No. 355, *Cost Standards for Railroad Rates*, notice of proposed rulemaking served December 7, 1978.

Several matters regarding our application of the cost of capital findings require clarification and refinement. First, in our prior decision, we indicated that the 10.2-percent cost of capital figure, which was used to arrive at a revenue need level, was based on an effective tax rate. In its petition for administrative review, complainant argues that, in fact, the computation of the rate prescribed was based on a statutory tax rate and that the rate prescribed was thus in error.

What our prior decisions failed to make clear—and this is the source of the not inconsiderable confusion that has arisen regarding this issue—is that the effective tax rate of 15 percent was used only in determining the carriers current cost of debt capital on an after-tax basis. The 10.2-percent figure therefore represented the carriers' weighted after-tax cost of debt (6.9 percent) and cost of equity capital of 12 percent, computed in the following way:

	Percent of total capitalization	Cost rate	Weighted cost rate
		Percent	*Percent*
Debt	35	[a]6.9	2.42
Equity	65	12	7.80
			10.22

[a] Current cost of debt, before taxes, of 8.1 percent reduced to 6.9 percent by multiplying 8.1 percent by 1 minus an effective tax rate of 15 percent. This particular downward adjustment to the debt portion of the cost of capital in the prior decision was inappropriate. No adjustment to the debt component was necessary because any resulting net operating income figure would be stated as before interest charges but after taxes. Thus, the debt portion already reflected the tax benefit from the deductibility of interest.

However, what our prior decision did not specifically discuss is the conversion of that after-tax rate of return to a pretax return. In converting the return elements of the Rail Form A costs for the level reflecting the embedded debt rate to the "revenue need" level of 10.2 percent which we had there found to be appropriate, the cost of capital (revenue need factor) was converted to the pretax rate of 17.89 percent.[18] This was the procedure which was used in developing the "cost plus return" which was used as the basis for the

[18] The 17.89-percent pretax rate was derived by applying a 43-percent tax rate to the revenue need factor. Direct application of this rate to the revenue need factor (10.2 percent divided by 1 minus .43), in effect, simulates the use of a 48-percent statutory tax rate applied to the after-tax cost of equity capital. Application of the 43-percent tax rate to the revenue need factor produces a pretax rate closely approximating the pretax rate that would otherwise be derived by pretaxing only the cost of equity at the statutory tax rate.

With respect to the investment tax credit, we believe that recognition of this tax element as an aspect of the carriers' cost is clearly intended by Congress. For purposes of establishing the taxpayers cost of service, section 203(e) of the Revenue Act of 1964 directs Federal agencies regulating businesses other than public utilities not to "flow" the benefits of the investment tax credit "through" to customers at any time. The purpose of the provision is to create an incentive for modernization and growth of modern industry. This provision is more fully discussed in our decision in Ex Parte No. 338, *Establishment of Adequate Railroad Revenue Levels,* 358 I.C.C. 844, 892-94 (1978).

Accordingly, we believe that for present purposes, the tax rate to be used should take account not only of actual taxes but deferred taxes and the investment tax credit as well. When this approach is followed, the recognizable tax rate approximates the statutory rate.

The defendants argue that the Commission has ignored the principle of differential pricing by prescribing as a reasonable maximum a rate determined to be exactly equal to fully allocated cost plus a fair economic return. Since they must haul many commodities at below fully allocated cost, the railroads contend that they must be permitted to price some services (this one, in particular) substantially above fully allocated cost, including a fair return.

Conclusions.—The Commission has, in the past, recognized the role of differential pricing in railroad ratemaking in general. In Ex Parte No. 338, *Establishment of Adequate Railroad Revenue Levels,* 358 I.C.C. 844, 853 (1978), we observed that rates cannot be set simply to cover the costs incurred in providing a particular service, but must be set at a higher level where possible to make a contribution to the coverage of fixed costs. The railroads must be able to price some of their services above full cost if they are to compensate for the fact that competition forces them to price certain services above variable cost but below full cost.

Nevertheless, the railroads should not be allowed to make up their entire shortfall by extracting monopoly profits from captive shippers. It is essential that some limit be placed on rates to prevent unfairness to individual shippers and distortions in the economy. At the same time we should be careful not to force the railroads to carry coal at a rate which is artifically low. If we set one formula for coal rates, then we must be prepared to apply that formula to similarly situated shippers of other commodities.

The question is one of determining the extent to which some shippers should subsidize others in the interest of producing a financially

viable rail system. There is no simple formula for making that determination. Before the Commission can impose a substantial burden on some shippers, the railroads must show more than revenue need on a system basis. The Commission must have additional data, including (1) specific identification of the traffic that must be subsidized by other traffic and the reason why rates cannot be increased on that traffic; (2) the extent to which the railroads provide service on unprofitable branch lines and the reason(s) why such service cannot be made profitable or abandoned; (3) identification of commodities other than coal which could also make substantial contributions to the railroads' system revenue needs; and (4) identification and quantification of excess capacity on a carrier's system.

A related consideration here is our policy to encourage innovative and aggressive marketing and pricing policies on competitive traffic. The railroads need to take a hard look at cost of service and either weed out the traffic which is noncompensatory or else raise rates where possible. Until a railroad has shown that it is unable to increase revenue on its competitive traffic, we will be reluctant to approve or prescribe rates which are significantly higher than fully allocated cost (at the revenue need level) on traffic such as that involved here.

Regulation of rates where differential pricing is required necessarily involves a policy judgment. The Commission has underway a proceeding which could lead to more precise standards in this area. Ex Parte No. 347, *Western Coal Investigation—Guidelines for Railroad Rate Structure,* notice of proposed rulemaking served May 17, 1978. In the interim, the explicit mandate of the 4R Act to give deference to carrier revenue need in rate proceedings cannot be ignored (49 U.S.C. 10704(a)(2)).

We cannot find that the railroads involved here have achieved revenue adequacy. Our own standards (see Ex Parte No. 353, *supra*) indicate that their rates of return are low. Thus some increment above fully allocated cost is desirable and logical on traffic such as that involved here.

Based on these considerations, we believe a rate set a 7 percent above fully allocated cost (calculated at the revenue need level) is reasonable in the interest of providing increased revenues to meet the system needs of the defendants. This figure represents our best judgment as to an appropriate increment to be borne by the San Antonio movement. Based on this 7-percent increment, we find that a rate not exceeding $17.23 is just and reasonable on this movement.

An increment above this level might be justified by a strong showing that the railroad is unable to increase revenue on its competitive traffic. Evidence of the carrier's traffic mix would be extremely important in this consideration.

Pending the formulation of more precise standards in Ex Parte No. 347, we believe a 7-percent increment is warranted on the record. As indicated above, carriers which believe this increment is inadequate may introduce evidence concerning their attempts to increase revenue on competitive traffic by modern cost finding, aggressive and innovative marketing techniques, and pricing policies. An analysis of the carrier's traffic mix will be required. Evidence submitted in the yearly revenue need proceedings will also be considered.

Finally, it must be emphasized that it should not be inferred, from the apparent numerical precision contained in our rate prescription here, that we have arrived at a permanent formula for determining maximum rates on this coal movement or any other coal movement. We have provided a precise answer because that is our obligation in a proceeding such as this.

Prescribing the rate at fully allocated cost plus a return factor based upon the carriers' overall capital costs and a 7-percent increment represents our best judgment as to the maximum reasonable rate on this traffic at this time. As discussed in our prior report, reliance on comparable movements, which has been a traditional indicator of maximum reasonableness, would not have been appropriate in view of the dynamic nature of the western coal rate structure. A more refined methodology for determining maximum reasonableness on western coal rates must await our decision in Ex Parte No. 347, *supra*.

Ultimate Findings

We find that a rate of $17.23 constitutes a maximum reasonable rate on this traffic, subject to the general increase approval in Ex Parte No. 357, *Increased Frt. Rates & Charges, Nationwide—8 Percent*, 359 I.C.C. 740 (1978). Status reports, described in appendix B hereto, are to be filed within 6 months from the service date of this decision.

Except to the extent of the modifications made in this decision, the appeal of complainant San Antonio and the various petitions for administrative review are denied. Requested findings not specifically discussed in this report nor reflected in our findings or

conclusions have been considered and found not justified, or their resolution not necessary for the proper disposition of this proceeding. Our reexamination of the issues on appeal and through the various petitions which have been filed renders oral argument to the full Commission unnecessary. San Antonio's petition for oral argument is denied.

COMMISSIONER GRESHAM, dissenting:

I am once again dismayed by our disjointed and inconsistent approach to the western coal rate cases. I also again cannot accept the pendancy of Ex Parte No. 347 as an explanation for what can only be described as disorganization. This decision is, nonetheless, encouraging in certain respects.

Clearly one of the chief aims of the 4R Act was to accord greater deference to the pricing decisions of rail management. With that in mind, one must applaud the majority for its recognition of the need for differential pricing. The majority permits a rate at 7 percent above fully allocated costs, and the majority, to its credit, is quite forthright in describing how tentative is the fashioning of the 7-percent figure. In fact, I have no quarrel with the fundamental reasoning in this decision. I do, however, have real problems with the line drawing. I would approve the full amount of the increase. This proposal is not out of line with others recently approved by the Commission, and I can find nothing magic in the 7-percent figure used by the majority in its final calculation. In fact, the figure is plainly arbitrary and fails to reflect adequately the carriers' revenue needs and overall economic situation.

COMMISSIONER CHRISTIAN, dissenting:

My dissent to the decision in No. 36970, *Annual Volume Rates on Coal—Wyoming to Flint Creek, Arkansas* (decided May 17, 1979) details my reasons for not adopting the "seven percent solution" embraced by the majority. I dissent to the instant decision for the same reasons.

It is ordered:

This proceeding is discontinued.

By the Commission, Chairman O'Neal, Vice Chairman Brown, Commissioners Stafford, Gresham, Clapp, and Christian.

Commissioner Gresham dissenting with a separate expression. Commissioner Christian will submit a separate expression at a later date.

(SEAL)

H. G. HOMME, JR.,
Secretary.

APPENDIX A

I. *Calculation of the fixed plant investment additive by defendants and restated by the Commission to reflect a 10.6-percent after-tax cost of capital (pretax 17.2 percent)*

A. *Defendants calculation* (Based on 11-percent after-tax cost of capital)

1. $20.92 Fixed plant investment per car from exhibit M. L. Hall 7 (1976)
2. 25.01 Fixed plant investment per car from exhibit M. L. Hall 7 (1977)
3. 45.93 Total per car
4. 100.4 Tons per car
5. 45.7 Cents per ton (L. 3 ÷ L. 4)

B. *Commission's restatement* (Based on a 10.6 after-tax cost of capital which equates to a pretax cost of capital of 17.8 using a statutory tax rate of 46 percent).

1. $19.67 Fixed plant investment per car shown by defendants in the amount of $20.92 (based on 11-percent after-tax cost of capital (pretax rate of 19.3 percent) restated to reflect a 10.6-percent after-tax (pretax rate of 17.2 percent))
2. 23.08 - $25.01 figure of defendants restated as in item 1.
3. 42.75 Total per car
4. 100.4 Tons per car
5. 42.6 Cents per ton (L. 3 ÷ L. 4)

II. *Calculation of costs*

The Rail Form A variable cost of $9.79 per ton was developed from complainant's witness Leroy Peabody's exhibit 13, with the exception of loss and damage where defendant's costs were used. The fully allocated costs were based on ratios of variable to fully allocated costs furnished by defendants' witness M. L. Hall in his exhibits 8 and 9.

	Per ton	
Complainant's variable costs	$9.776	
Complainant's loss and damage	-.008	
Defendants' loss and damage	+.019	
Total	9.787	per ton or $9.79 as shown on appendix A, page 20 of the decision.

	Variable costs' *Per carload*			*Fully allocated costs* *Per carload*
A. *Expense portion:*				
BN	$251.88			
	-.65	L & D[4]		
	+1.48			
	252.71		x [5]1.22300	$309.064
CS	218.02		x [5]1.27596	278.18
FWD	220.47		x [5]1.22207	269.43
SP	212.98			
	-.19	L & D[4]		
	+.44			
	213.23		x [5]1.21278	258.60
B. *Return portion:*				
Road	$47.94		x [6]2	$95.88
Equipment	30.26			30.26
Total variable (expense portion + return portion)				
Per car	$982.63			$1,241.44
Tons per car	100.4			
Per ton	9.79			12.36

[1]Complainant's exhibit LEP-13, pages 5 and 6.
[2]Complainant's exhibit LEP-13, page 4 ($0.84 per car ÷ 100.4 tons per car).
[3]Defendants' exhibit MLH-8 or 9 ($1.92 per car ÷ 100.4 tons).
[4]Loss and damage expense per carload from exhibit LEP-13, page 4, item 16.
[5]Defendants' exhibit MLH-8 and 9, ratios of individual road costs expense portion times ratio of total to constant costs from Rail Form A, schedule C, line 222, column 4, (B + 2409) + 1.0.
[6]Road cost of capital times two based on variability factor in Rail Form A.

III. *Comparison of fully allocated costs (at embedded debt level) with fully allocated costs including the 10.6-percent return factor*

Embedded debt level

	Expense portion	Return portion-embedded debt	
		Road	Equipment
1. BN	$309.06	$30.18	$22.68
2. CS	278.18	15.28	.23
3. FWD	269.43	30.06	.48
4. SP	258.60	19.76	6.87
5.	1,115.27	95.88	30.26

Total of expense portion ($1,115.27) plus return portion at the embedded debt level (road $95.88; equipment $30.26) equals total fully allocated cost per carload ($1,241.41) divided by 100.4 tons per car equals total fully allocated cost per ton with return portion at the embedded debt level ($12.36).

10.6-percent return factor

		Return at 10.6-percent after-tax or 17.2-percent pretax[1]	
		Road	Equipment
6. BN	Same as above	$94.92	$71.33
7. CS	do	52.31	.79
8. FWD	do	93.82	1.47
9. SP	do	59.90	20.83
10.	$1,115.27	300.95	94.42

Total of expense portion ($1,115.27) plus return portion at 10.6-percent after-tax or 17.2-percent pretax (road $300.95; equipment $94.42) equals total fully allocated cost per carload ($1,510.64) divided by 100.4 tons per car equals total fully allocated cost per ton with return portion at 17.2 percent pretax rate ($15.05) plus fixed plant investment addive[2] ($.43) equals $15.48. This total cost per ton increased to reflect the increased rate level effective with Ex Parte No. 349, equals $16.10 per ton ($15.48 times 1.04 equals $16.10).

[1]Return items from lines 1, 2, 3, and 4 x ratios shown below:

Rail Form A interest rates based on note 1 to exhibit LEP-13, page 7		Ratio of RFA interest rates to 17.2 pretax rates
BN	5.469	3.1450
CS	5.024	3.4236
FWD	5.621	3.0680
SP	5.674	3.0314

[2]The development of the fixed plant investment additive of 43 cents per ton is explained on sheet 1 of this appendix.

IV. *Summary of adjustments to rail Form A costs at the embedded debt level to reflect revenue need levels of 10.2 and 10.6 percent*

A. *Return portion of Rail Form A Costs (fully allocated) separated between road and equipment at the embedded debt level*

	Road	Equipment
1. BN	$30.18	$22.68
2. CS	15.28	.23
3. FWD	30.66	.48
4. SP	19.76	6.87
5.	95.88	30.26

$95.88 plus $30.26 equals $126.14 divided by 100.4 tons per car equals $1.25 return per ton based on embedded debt level.

B. *Return portion of Rail Form A costs (fully allocated) separated between road and equipment based on a 10.2-percent after-tax cost of capital level or 17.89-percent pretax*

1. BN	$98.72	$74.19
2. CS	54.41	.82
3. FWD	97.58	1.53
4. SP	62.30	21.66
5.	313.03	98.20

$313.03 plus $98.20 equals $411.23 divided by 100.4 tons per car equals $4.10 return per ton based on 17.89-percent pretax cost of capital.

C. *Return portion of Rail Form A (fully allocated) separated between road and equipment based on a 10.6-percent after-tax cost of capital level or 17.2-percent pretax*

1. BN	$94.92	$71.33
2. CS	52.31	.79
3. FWD	93.82	1.47
4. SP	59.90	20.83
5.	300.95	94.42

$300.95 plus $94.42 equals $395.37 divided by 100.4 tons per car equals $3.94 return per ton based on 17.2-percent pretax cost of capital.

CALCULATION OF THE DIFFERENCE BETWEEN THE RETURN AT THE EMBEDDED DEBT RATES AND THAT BASED ON 10.2 PERCENT AND 10.6 PERCENT

1. $1.25 return per ton based on embedded debt rates.
2. $4.10 return per ton based on 10.2 percent at 48-percent tax rate.
3. $2.85 difference between embedded debt rates and 10.2 percent.
4. $3.94 return per ton based on 10.6 percent at 46-percent tax rate.
5. $2.69 difference between embedded debt rates and 10.6 percent.

APPENDIX B

Status reports

We require status reports to (1) verify that all of the investments recorded in the carriers' cost evidence have actually been made or will be made in the immediate future and (2) verify that fixed plant investment costs have been properly allocated among unit-train coal and noncoal shippers. These status reports should be filed with the Commission's Bureau of Accounts, Section of Cost and Financial Analysis, within 6 months of the service date of this decision.

FIXED PLANT INVESTMENTS

(1) Fixed plant investments should be described according to the line segment of track involved, and the mileages involved.

(2) Fixed plant investments should be broken down into expense and capital portions.

(3) Detailed workpapers used to arrive at both the expense and capital portions should be included. These workpapers should include copies of the involved Authorities for Expenditure (AFE) and Railroad Completion Reports. These papers should detail the breakdown of materials, labor, et cetera used line segment.

(4) If fixed plant investments claimed by the railroads were based on AFE's and the amounts claimed for any given year differ from that actually expended, then the railroads should show and explain these differences and indicate whether the improvements are still contemplated and if so, when will they be made.

LOCOMOTIVE AND CABOOSE INVESTMENTS

(1) The terms of the purchase and subsequent lease agreements including the interest rates used by the railroads in financing the additional locomotive and caboose investments.

ALLOCATIONS AMONG COAL SHIPPERS

(1) The basis for and the percentages used to allocate fixed plant investment costs among coal and noncoal shippers should be provided.

(2) The workpapers used to determine the allocations described in (1) above should be provided.

(3) A description of all traffic that moves over the involved line (both coal and noncoal) should be provided including origin and destination as well as coal tonnage and noncoal tonnage by line segment.

(4) Is any new traffic contemplated within the next 5 years over the involved line. If so, please provide by line segment, the projected coal and noncoal tonnage.

MAINTENANCE OF WAY

(1) State for each major line setment[1] (a) the amount of coal unit-train traffic and (b) the amount of general freight traffic (excluding coal unit-train traffic) which has moved over the line in each year from and including 1973 through 1978; expressed in (a) train-miles; (b) total car-miles (loaded plus empty); and (c) gross ton-miles of cars and content.

(2) State the amounts expended for freight maintenance-of-way and structures expense, for each of the line segments set out in 1 above, for each year from and including 1973 through 1978. This statement should include a breakdown of such expense for line segment containing all the categories of expense detailed in Annual Report Form R-1, schedule 320, lines 1 through 64, column (e).

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[1]Cordero Mine to Amax Juct., WY; Amax Juct., WY to Donkey Creek, WY; Donkey Creek, WY to Alliance, NE; Alliance, NE to Denver, CO; Denver, CO to Texline, TX; Texline, TX to Fort Worth, TX; Fort Worth, TX to San Antonio, TX.

INTERSTATE COMMERCE COMMISSION REPORTS

No. 36180

SAN ANTONIO, TEXAS ACTING BY AND THROUGH ITS CITY PUBLIC SERVICE BOARD v. BURLINGTON NORTHERN, INC., ET AL[1]

Decided October 19, 1978

In a reopened proceeding, rate on unit-train coal movements from Campbell County, WY, to San Antonio, TX, of $16.12 per net ton found to constitute a maximum reasonable level.

Curtis H. Berg, Charles W. Burkett, Richard M. Gleason, R. Eden Martin, Richard J. Metzger, and *Howard J. Trienens* for defendant railroads.

C. Michael Loftus, Arthur von Rosenberg, and *William L. Slover* for complainant City Public Service Board of San Antonio, Texas.

Bruce C. Driver and *Eric J. Fygi* for United States Department of Energy.

John L. Hill, David Hughes, and *Peter Schenkkan* for the State of Texas, intervenor.

Constance L. Abrams, Linda Heller Kamm, and *Diane R. Liff* for United States Department of Transportation.

Barry Busworth, Thomas D. Hopkins, Milton Kafoglis, and *Roy A. Nierenberg* for the President's Council on Wage and Price Stability.

DECISION

BY THE COMMISSION:

This proceeding was reopened by Commission order, served October 27, 1977, for receipt of additional evidence and possible modification of the rate prescribed in *San Antonio, Tex.*, v. *Burlington Northern, Inc.*, 355 I.C.C. 405 (1976), (hereinafter referred to as *San Antonio.*[2] In its prior decision, the Commission prescribed a rate of $10.93 per ton[3] for projected coal movements in

[1]Defendants are Burlington Northern, Inc., The Colorado and Southern Railway Company, Fort Worth and Denver Railway Company, and Southern Pacific Transportation Company.

[2]The Commission's decision was affirmed by the United States Court of Appeals for the Eighth Circuit in *Burlington Northern, Inc.*, v. *United States*, 555 F. 2d 637 (8th Cir. 1977).

[3]A rate of $10.16 per ton was considered just and reasonable, and the Commission increased the rate to $10.93 per ton as a result of rail general rate increases in Ex Parte Nos. 313 and 330.

unit trains from mines in Campbell County, WY, to San Antonio, TX.[4] The present rate for the coal movements now in operation is $12.42 per ton.[5]

Several major issues concerning costs and ratemaking for large volume coal traffic in unit trains have been raised in this proceeding. The Commission is acutely aware of the impact individual rate proceedings may have on the development of a freight rate structure in the emerging western coal market. Although we have initiated a broad investigation of that rate structure in Ex Parte No. 347, *Western Coal Investigation—Guidelines for Railroad Rate Structure*, (NPRO served May 17, 1978), that proceeding has not been completed. Therefore, our resolution of certain issues presented in this proceeding cannot be, and is not intended to be, definitive. The approach taken here must be recognized as an interim one, pending our conclusions in the broader context of Ex Parte No. 347 and other ongoing investigations, such as Ex Parte No. 353, *Adequacy of Railroad Revenue (1978 Determination)*.

BACKGROUND

The facts surrounding this controversy were adequately stated in our prior decision and, except where otherwise specifically indicated, are accepted for purposes of this reopened proceeding. A brief review of the record, however, is necessary.

The rate under examination in the instant proceeding was prescribed by the Commission after the city of San Antonio, acting by and through its City Public Service Board (hereinafter referred to as complainant or San Antonio), filed a complaint on May 6, 1975. Complainant alleged that defendant railroads[6] refused to offer just, reasonable, and lawful rates and services on coal traffic which was soon to move in unit trains from mines in Campbell County, WY, to San Antonio's new coal-fired generating plant in Elmendorf, TX.

San Antonio's complaint also alleged that the decision to convert to coal, and particularly the mines and rail routes chosen, was based on a rail rate promised by the railroads.[7] The defendant railroads

[4]Coal is received at the J. T. Deely generating plant at Elmendorf, Tex., a suburb of San Antonio, TX.

[5]The prescribed rate of $10.93 per ton has been adjusted to $12.42 per ton as a result of rail general rate increases in Ex Parte Nos. 336, 343, and 349.

[6]The coal is transported to San Antonio via a joint routing of four railroads: the Burlington Northern; the Colorado and Southern; the Fort Worth and Denver; and the Southern Pacific.

[7]The negotiated rate was $7.90 per ton if carried in San Antonio's cars, and $9.80 if carried in railroad cars. San Antonio requested the Commission to prescribe a rate of $9 per ton in shipper cars.

admitted that they originally proposed a rate of $7.90 per ton, but argued that the rate had been raised before the city entered into various coal contracts. The defendants also argued that they would have to make substantial new investments in plant and equipment to carry the coal for the San Antonio movement. The defendants, therefore, asked the Commission to prescribe a rate of $12.70 per ton, premised on use of shipper-supplied cars.

In our prior decision, we applied the following ratemaking criteria: (1) comparison of the rate under consideration with established rates for comparable shipments in the territory involved; (2) the relationship between the rate and the cost of providing the service; and (3) the economic effects of the particular rate on the affected communities. It was further added that rates should not be prescribed which add to the burdens faced by rail carriers in recent years, and that "rates on a particular commodity should cover not only variable costs but also should yield enough above such costs to cover the carriers' constant costs of performing the service." *San Antonio, supra,* at 414. After examining the evidence with regard to the above-mentioned criteria, a rate was prescribed which approximated the full-cost level of the coal traffic. The prescribed rate covered restated variable costs of $8.03 per ton, and provided a contribution of $2.13 towards fixed costs.[8] The Commission further noted that "*as actual experience is gained, the parties may petition for modification of the prescription if circumstances warrant.*" *San Antonio, supra,* at 417.

This proceeding was reopened pursuant to petitions filed by defendant railroads.[9] Evidence to be submitted *was limited to allegations of error regarding* the Commission's costing *methodology* in its prior report and order, *new cost evidence based on the actual operating experience of the movements subject to the prescribed rate,* and any existing rate comparisons which properly reflected similar conditions and transportation characteristics. Additionally, the parties were permitted to separately address the question of a fair, reasonable, and economic profit or return on the subject movements.

In accordance with the order reopening this proceeding, defendant railroads filed their Statement of Fact and Argument on

[8] Although the prescribed rate made no specific allowance for a before-tax return on equity above the level of the embedded cost of debt, it was recognized that the defendants would realize over $6 million annually above their variable cost due to the volume of traffic to be carried.

[9] By petitions filed June 16, 1977, and July 15, 1977, defendants stated that sufficient experience had been obtained which justified modification of the prescribed rate.

December 12, 1977, and complainant San Antonio filed its Reply Statement of Fact and Argument on February 13, 1978. Statements by intervenors[10] were subsequently admitted into the record in whole or in part, and defendants filed a separate Reply Statement of Fact and Argument to the statements of DOE and Texas. San Antonio filed a Supplemental Statement on May 23, 1978, after obtaining additional information from interrogatories propounded during the discovery phase of this proceeding.

Discussion and Conclusions

The principle issue in this reopened proceeding is whether changed circumstances warrant modification of the previously prescribed rate ($10.93 per ton) and, if so, whether the defendants' proposed rate of $18.23 per ton is reasonable or some lesser maximum rate level should be prescribed. *Very little evidence of actual operations was placed in the record.* Thus, defendants' cost evidence suffers from most of the same defects as noted in our prior decision. However, detailed evidence concerning appropriate rate comparisons, and a fair, reasonable, and economic profit or return was submitted by both parties to this proceeding. Questions of national transportation and energy policy were also raised in the context of examining maximum reasonable rate levels for large-volume coal movements.

It should also be noted that environmental issues were raised by the State of Texas. Such issues were not before us at the time of our prior decision and we found that this was not a major Federal action significantly affecting the quality of the human environment. We see no reason to change that conclusion here. The San Antonio powerplant is now operating and the record does not demonstrate that the utility will convert its boilers from coal in response to higher transportation rates, given the substantial capital costs involved. While our decision in this proceeding may result in higher electricity rates, this is an economic impact not within the scope of the National Environmental Policy Act of 1969.

The major concern of the State of Texas with respect to the environmental implications of this action is that it will set a pattern for future rate increases which may inhibit or preclude subsequent conversion of Texas utilties to coal. As previously noted, western coal rates, in a broader context, are being investigated in Ex Parte

[10] These include the State of Texas (Texas), United States Department of Transportation (DOT), United States Department of Energy (DOE), and the Council on Wage and Price Stability.

No. 347, *supra*. Our notice of proposed rulemaking indicated that a comprehensive environmental assessment will be made in that proceeding. The generic study will address the long-range impacts adverted to by the State. We believe that proceeding in this manner is entirely consistent with the approach to resolution of environmental issues approved by the Supreme Court in *Aberdeen & Rockfish R. R. Co.* v. *Students Challenging Regulatory Agency Procedures (Scrap)*, 422 U.S. 289 (1975) (Scrap II).

COMPARABLE RATES

The rate comparisons presented by complainant and defendant railroads do not support prescription of a rate at a particular level. However, the rate comparisons of record do indicate that the present rate is below a maximum reasonable level and that a modification is warranted.

Defendant railroads primarily contend that several rates, principally the rates found lawful in docket No. 36608, *Incentive Rate on Coal—Smithers Lake, Texas*, 358 I.C.C. 537 (served November 30, 1977) (hereinafter "*Smithers Lake*") and docket No. 36612, *Incentive Rate on Coal—Cochise, Arizona* (served November 28, 1977) 357 I.C.C. 683 (hereinafter "*Cochise* "), reflect changes in circumstances that have occurred since the Commission's previous decision in *San Antonio*. Generally, however, these changed circumstances are viewed as part of the increasing demand for and rising value of coal since the Organization of Petroleum Exporting Countries (OPEC) oil embargo of late 1973. Thus, defendants have submitted in tabular form rate comparisons which illustrate a large disparity of rates (in mills per ton-mile) based on "old" and "new" rate quotations. These rates, which are all-rail movements of western bituminous coal transported in unit-train service to utility plants in shipper-supplied cars, are contained in appendix B along with other pertinent information concerning the individual movements.

Defendants also assert that, in the context of the evolving rates for western unit-train coal movements, their proposed rate of $18.23 per ton (equal to 11 mills per ton-mile) is compatible with the more recently effected charges for similar service. Consequently, it is argued that the low rates cited by complainant in the previous proceeding[11] are irrelevant to the determination of a maximum

[11] The rates to Pueblo, CO, and Amarillo, TX, were discussed by the Commission in *San Antonio, supra*, at 414-15.

reasonable rate, and in fact have been held by the Commission[12] as not comparable to rates being made today under current economic and competitive conditions.

San Antonio contends that the rates upon which defendants rely provide no probative evidence on existing rate comparisons which properly reflect similar conditions and transportation characteristics of the movements in question. It is also asserted that there is no correlation between the age of a movement and its rate, and that the thesis of an "old" and "new" rate pattern, as presented by defendants, has no validity.

Specifically, complainant claims that four of the rates relied upon by defendants do not move any coal traffic.[13] It is also shown that the rate from Converse, CO, to Gary, IN, has a much greater unloading time and is applied to a smaller volume of traffic than the San Antonio movement. The rate from Belle Ayr, WY, to Amsterdam, MO, is alleged to be a result of the same "bait-and switch" tactics which led to the initiation of the *San Antonio* proceedings, and thus not a proper rate for valid comparison.

Complainant presents several sets of rates[14] which allegedly confirm the reasonableness and fairness of the prescribed rate to San Antonio. As contained in appendix C, one group of rate examples illustrates the current rates on large-volume coal movements previously introduced by complainant as evidence in *San Antonio,* two of which are the Pueblo and Amarillo movements originally relied upon by the Commission in its prior decision. Complainant suggests that these movements fully support the present prescribed rate to San Antonio, and that "no changed circumstances" exist.

A second group of rates, also contained in appendix C, is illustrative of the evolving status of the unit-train coal rate structure in the West. These rates are all large-volume coal movements from

[12]Defendants rely on statements contained in *Smithers Lake, supra* a 29-30, and *Cochise, supra,* at 696-97. The Commission found in those proceedings that sufficient evidence was produced which indicated that the Amarillo and Pueblo rates, when negotiated, were depressed by competition from closer coal sources, and that these factors must be considered in weighing the value of protestant's comparisons. For purposes of this proceeding, we do not incorporate evidence presented in a completely different rate proceeding. Defendants did offer separate evidence in the proceeding, however, which indicates that the rates to Pueblo and Amarillo were set as a result of competitive pressures.

[13]Complainant alleges that the following rates (at the time of filing of its statement) are inoperative as to actual traffic, cannot be characterized as "going rates," and are the subject of administrative or court appeal: Belle Ayr, WY/Redfield, AR, Cordero, WY/Smithers Lake, TX; Gallup, NM/Cochise, AL; Cameo, VT/Daniel, MS. Traffic is currently moving, however, on several of these rates.

[14]Rate levels are of January 1, 1978.

Belle Ayr, WY, similar to the San Antonio movement, and are alleged to be probative to the establishment of a rate for San Antonio.

With respect to any analysis of rate comparisons on western coal submitted by the parties, we must be cognizant that a rulemaking has been instituted, by decision served May 17, 1978, in Ex Parte No. 347, *Western Coal Investigation—Guidelines for Railroad Rate Structure*. This proceeding, whose principal purpose will be the determination of appropriate levels of minimum and/or maximum rates for large-volume coal movements, will additionally examine several issues relating to the emerging western rate structure for coal. It would be counterproductive to an informed resolution of these issues to assign great weight to rate comparisons which represent only a small portion of a large, developing rate structure.[15] Unless an established rate structure exists, rate comparison is of limited value.

The Commission recognizes, therefore, that the rate comparisons for movements presented in this proceeding reflect an evolving and dynamic rate structure which is presently in a state of flux. This does not suggest that all evidence of comparable rates herein should be completely ignored or discounted. It is simply a recognition that such rate comparisons, when used to help determine a maximum reasonable rate are of considerably less probative value than if the comparable rates were from a more established structure such as that in the East. However, the comparisons offered by both parties do suggest that the present rate is below a maximum reasonable rate and that modification of that rate is warranted.[16] The current rate of $12.42 per net ton yields 7.53 mills per ton-mile (12420 mills/1650 miles) which is below the compared movement averages on both sets of complainants' rates set out in appendix C.

Evidentiary Deficiencies Hindering Rate Prescription

As explained below, the general information submitted would tend to indicate that a rate as high as $16.62 per net ton might be justifiable. However, the failure of the carriers to submit the

[15] Despite the contentions of the defendant railroads, we do not believe that the existence of a small number of rates on western coal establishes a controlling rate structure, particularly where the compared rates are established under the limited, extremely expedited, evidentiary procedures of a capital incentive rate proceeding.

[16] The fact that the present rate may be compensatory and may be within the zone of reasonableness—and thus lawful if voluntarily proposed—does not mean that prescription of a rate at that level is warranted, as contended by complainant.

evidence of actual operating experience as requested leads to the conclusion that defendants' evidence only permits prescription of a $16.12 maximum reasonable rate.

When we reopened this proceeding we specifically requested cost evidence based on actual experience with the affected movements. Although defendants' petition to reopen had indicated sufficient data had or could have been obtained, very little has been provided.[17] The need for actual operating data is particularly important given the "bait and switch" tactics employed earlier by defendants. San Antonio was persuaded to enter into particular long-term arrangements for the supply of coal as fuel based upon a perceived bargain with defendants. Once these commitments had effectively eliminated the railroads' competition, they engaged in various pricing maneuvers in an attempt to use their newly monopolistic position to enhance their revenues. The result was litigation before this Commission which necessitated prescription of a rate before operating experience had been obtained. Thus, this information is particularly important now. While the defendants continue to withhold this needed data, any uncertainties which result should be construed against them. The prescription we make today does not, of course, prevent the defendants from submitting such specific data if they believe it would justify a change in the maximum reasonable rate level.

Cost of Service

The cost evidence presented in this proceeding by complainant and defendant railroads indicates discrepancies in practically every cost component calculated for determining the cost of service of the subject traffic. The different consideration given to cost of capital, however, accounts for the major difference between the parties' development of variable costs. We have summarized the cost evidence submitted by San Antonio and defendant railroads in appendix A. Our analysis of the cost of service, also contained in appendix A, indicates that a large proportion of complainant's stated costs more closely approximates the actual costs associated with the coal movement in question.

Several items concerning costs and costing in this proceeding require further comment. In our prior rate prescripton, we

[17] As explained below, the only attempted refinement of Rail Form A system average costs based upon actual operating experience was an adjustment to crew wage expense. However, the 1-month special study on which it was based is not representative. Also, an addition reflecting incremental costs to fixed plant investment, which we have allowed in large part, was made.

determined a maximum just and reasonable rate which approximated the full-cost level. The prescribed rate covered variable costs of $8.03 per ton and provided a contribution of $2.13 towards fixed costs.

Defendant railroads contend that in determining fully allocated costs in the previous *San Antonio* proceeding, the Commission should not have used the ratio method of apportionment of constant costs. Moreover, defendants state that the level of constant costs produced using this method is much lower than the ton and ton-mile basis on traffic which is heavier than system average traffic. Defendants' contentions are without foundation. The mere fact that one method produces higher or lower costs than the other does not support the use of either basis. Rather, our purpose is to determine the costs which are properly attributable to the traffic at issue.

In docket No. 34013, *Rules to Govern Assembling & Presenting Cost Evidence*, 337 I.C.C. 298, 323 and in 10 (1970), the Commission stated:

> [T]he determination that one method is preferable to another method of allocating expenses in a particular situation, is a ratemaking function *** [a logical and reasonable allocation of expenses in one ratemaking situation might not be so in another ***.] For example, the *allocation of constant costs on a ton-mile basis, might (for ratemaking purposes), in certain circumstances, result in an inordinate portion of such costs being borne by extremely heavy-loading traffic, as compared to relatively light-loading traffic.* [Emphasis supplied.]

Consequently, we do not suggest that any single method is always proper. Since coal is characterized by heavy loadings, however, the dollar or ratio basis was, and is, a reasonable method of apportionment of constant costs to the affected traffic.

Additionally, defendants allege that the Commission erred in using the overall average percentage of variability figure of 79 percent taken from I.C.C. statement No. 1C1-74. Defendants provided the following ratios of fully allocated to variable costs for each of the railroads involved: BN-1.22300; CS-1.27596; FWD-1.22207; and SP-1.21278. Although the overall percent variable factor in 1974 for all class I railroads was 79 percent, this factor is not necessarily applicable to a particular railroad or movement. Use of the above-individual ratios furnished by defendant provides a more accurate measure of fully allocated costs since they reflect the average variability of the railroads involved.

Finally, defendants allege that the Commission erred in its treatment of cost of capital for road property in developing fully

allocated costs. Defendants argue that road property in Rail Form A is considered as being 50 percent variable and, therefore, should be doubled. Defendants are correct on this latter point.

Our restated calculations of fully allocated costs, as contained in appendix A, reflect the individual railroads' overall percentage of variability ratios as well as the correction for cost of capital for road property.

In costing the service of particular movements, Rail Form A utilizes the historical system average cost of borrowed capital (the embedded debt rate) in determining variable costs; an element reflecting a higher cost for equity capital is not included.[18] Thus, defendants' proposed additives for cost of capital, which are based on both their current cost of debt and a higher cost of equity capital, are in effect a change or modification in Rail Form A costing procedures.

As contended by complainant, therefore, we agree that inclusion of defendants' current capital cost additives are beyond the scope of this reopened proceeding.[19] The current cost of capital as a revenue need factor, however, will be considered in this proceeding in the context of defendant carriers' revenue needs.

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[18]The exclusion of a higher cost for equity capital as an element of variable costs is a longstanding Commission practice. See *Rules to Govern Assembling & Presenting Cost Evidence*, 337 I.C.C. 298 (1970). At page 393 of that decision, we took the position that while an allowance for return on risk-bearing capital (equity and current debt costs) should not be considered an element of variable cost, such an allowance may be considered as a factor in ratemaking:

> Allowances for return on investment *** to the extent that they are admittedly intended to serve as an encouragement and incentive for continued or new risk bearing ownership, are in the nature of so-called pure economic profits and should not be taken into account as an element falling within the restrictive construction to be given here to costs. This is not to say, however, that such an allowance for profit is not to be considered as a factor in ratemaking—it should, if transportation is to remain under private ownership and control. To re-emphasize, all that is meant here is that profit is not an element of cost, but a reward above and beyond costs. ***
>
> However, this so-called pure profit should be clearly distinguished from opportunity costs. The latter does include a return on investment, simple, in the sense of, and as the equivalent to, cost of capital, but in no way connected with the risk or incentive of ownership. It is with respect to this limited effect to be given to return on investment as an element of cost that the examiner generally agrees *** as to why equity capital invested in carrier facilities should be treated in the same manner as similar debt carrier capital [citation omitted]. Such equity capital then is entitled to receive imputed interest, similar to that charged for borrowed money ***.

[19]On October 3, 1978, the Commission instituted a proceeding, Ex Parte No. 355, *Cost Standards for Railroad Rates*, to address, among other issues, the question of whether a higher cost of equity capital should be included in variable cost calculations of rail movements. We stress that the treatment outlined in this decision is subject to possible modification if warranted by the outcome of that proceeding.

A particularly troublesome cost issue presented in this proceeding concerns the proper treatment of fixed plant investment. In our prior report in this proceeding we allocated a portion of defendant's claimed fixed plant investment cost directly to the movement at issue rather than using the Rail Form A historic system average cost procedures exclusively.[20] This was done because the Rail Form A average costs would have been understated since no effect of the additional fixed plant investment caused by addition of the subject traffic would have been included. Initiation of the subject traffic and the concomitant capital outlays required to support the significant volumes of coal being moved would have the effect of increasing the railroads average costs.

At the same time, we have recognized the lower than average costs developed from Rail Form A procedures in other specific cost categories (*e.g.*, switching, helper service, et cetera) associated with the economies of the large-volume coal movement.

It should be noted that in following this procedure, plant investment costs resulting from addition of the subject traffic have been excluded from the Rail Form A to avoid double counting the same element of additional fixed plant investment. Moreover, we find no merit in complainant's contention that the direct allocation of such costs is inconsistent with Rail Form A procedures. Rail Form A costs are designed to be flexible enough to allow substitution of unit costs, under normal operating conditions, for the movement in question. If the continuous operation of heavy-loaded coal unit trains requires greater than average capital outlays, then Rail Form A unit costs may be adjusted accordingly.[21] Investment in fixed plant, occasioned by the subject service, has only been made since 1976 and will continue to be made in future years. Therefore, Rail Form A system average costs reflect only those expenditures which have been made to date and will not reflect the impact of inflation on current and future expenditures made on behalf of the subject investment.

It must be noted that the subject traffic will, to some extent, utilize portions of the carriers existing fixed plant for which the investment is already included in the Rail Form A average costs. To the extent that Rail Form A system average investment costs

[20] Only that portion of plant capacity expenses expended or to be expended in the immediate future were included. This same procedure was followed in *Smithers Lake* and *Cochise*.

[21] No similar adjustment of Rail Form A costs has been made in the case of additional equipment investment. The unit costs of locomotives and caboose equipment were not expected to vary from their average unit costs of other services.

unrelated to this traffic are included, defendants' procedures would somewhat overstate this existing fixed plant investment cost for purposes of this proceeding. Unfortunately, the record does not permit the separation of Rail Form A system investment in plant between that related to the issue traffic compared to that related to all other traffic.

Even though some overstatement of expenses may occur we believe that Rail Form A system average costs, plus the aforementioned additive for fixed plant investment, would insure that the carrier recovers its actual costs with more certainty than the use of the unadjusted Rail Form A average amounts. System average investment costs for these carriers are small compared to the additional costs shown for the issue traffic. Thus, we will adjust the system costs rather than eliminate the additive.

Since respondents have failed to provide details of actual operations, including a greater indication of the extent to which the incremental fixed plant investments will benefit other current and projected new traffic moving along the same lines, defendants have not shown that the entire amount of the claimed additional investment is attributable to this traffic. In addition, as noted, an overstatement occurs because of inclusion to some extent of these expenditures in the system average Rail Form A costs accepted in this proceeding. Accordingly, we conclude that the claimed amount should be cut back by approximately 30 percent to more accurately reflect the information of record.[22]

In conclusion, our restated variable costs for the subject movements are $10.08 per ton. Further, based on ratios for individual roads supplied by defendants, and considered herein to be the best evidence of record (complainant did not calculate fully allocated costs), we have also restated fully allocated costs at $12.65 per ton. These costs, with the exception of the additive for fixed plant investment and other minor exceptions, are as presented by complainant and are found to most accurately describe the costs of the subject coal movements.

Revenue Need

The Commission requested in this reopened proceeding that the parties separately address the question of a fair, reasonable, and

[22] As explained below, we have used a 10.2-percent rate of return in this proceeding. This would permit a $.42 allowance for incremental fixed plant investment. A 30-percent cutback would reduce this to $.29. This 30-percent figure is our best estimate given the data produced.

economic profit or return on the San Antonio coal movements. This issue was raised for the specific purpose of examining the statutory guidelines presented in section 15a(4) of the Interstate Commerce Act,[23] and its application to individual rate proceedings.

In discussing the question of a fair, reasonable, and economic profit or return on the San Antonio coal traffic, defendant railroads cite at length the purpose and requirements of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), and note that the Commission made no reference to the 4R Act ratemaking provisions in its previous decision.[24] Consequently, defendants contend that the previously prescribed rate does not produce a "fair profit or return," and that the cost of capital reflecting a higher cost of equity as well as the cost of debt must be considered in the Commission's evaluation of the defendants' proposed rate modification of $18.23 per ton.

San Antonio, on the other hand, argues that the provisions of the 4R Act do not constitute a license for rail exploitation of coal traffic over which defendants maintain market dominance. It is asserted, therefore, that the present prescribed rate is highly profitable to the defendants and should not be changed.

Although the Commission has traditionally judged a rate's profitability in terms of the amount that rate contributes to the carrier's fixed cost,[25] section 15a(4) of the Interstate Commerce Act requires that the Commission give due consideration to the revenue needs of railroads in addition to their fixed costs. As we stated in Ex Parte No. 338, *Establishment of Adequate Railroad Revenue Levels*, served February 3, 1978:

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[23]Section 15a(4) provides, in part, as follows:

> With respect to common carriers by railroad, the Commission shall within 24 months after the date of enactment of this paragraph, after notice and an opportunity for a hearing, develop and promulgate (and thereafter revise and maintain) reasonable standards and procedures for the establishment of revenue levels adequate under honest, economical, and efficient management to cover total operating expenses, including depreciation and obsolescence, plus a fair, reasonable, and economic profit or return (or both) on capital employed in the business. Such revenue levels should (a) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation, and (b) insure retention and attraction of capital in amounts adequate to provide a sound transportation system in the United States. The Commission shall make an adequate and continuing effort to assist such carriers in attaining such revenue levels.

[24]As the court noted in its approval of the original rate prescription in *Burlington Northern, Inc. v. United States*, 555 F. 2d 637, 640 (8th Cir. 1977), this proceeding was instituted on May 6, 1975, prior to the passage of the 4R Act.

[25]*Rules to Govern Assembling & Presenting Cost Evidence, supra*, at 405-406.

Where the reasonableness of a rate is questioned in an individual proceeding, we consider, among other things, cost evidence, comparative rate evidence, and circumstances relating to demand and competition. The effect of section 15a(4), we believe, is to require that revenue adequacy also be given explicit consideration ***. Ex Parte No. 338, p. 18.

It is also clear, however, that the 4R Act (which created section 15a(4)), declares it to be the policy of that act "to balance the needs of carriers, shippers, and the public."[28] As stated in Ex Parte No. 338, *supra*, at p. 7:

[C]ongress did not intend for our mandate to be simply one of promoting railroad revenues. Consideration of shipper and public interests requires that revenue adequacy be taken not only as a goal but also as a limitation. In other words, to the extent possible, we are to assist the railroads in attaining revenue adequacy, and to protect the public from having to provide revenues that exceed an adequate level.

This balancing of interests is by no means a simple task. The Commission's regulatory function in such a controversy, however, is clear. Our primary responsibility in assisting carriers to attain revenue adequacy in individual rate proceedings is to allow carriers to set rates at a level which takes into account the guidelines in section 15a(4) *and* the needs of shippers, market conditions, the presence or absence of competition, and the overall public interest.

We agree with defendants that proper implementation of the ratemaking guidelines contained in the 4R Act requires a modification of the rate and prescription of a rate higher than the fully allocated cost level. As the following discussion will illustrate, we believe the maximum reasonable rate for the subject movement is appreciably less than the defendant's proposed rate of $18.23 per ton.

POLICY QUESTIONS

The transportation of coal, and the rates under which it will move, will play a vital role in this Nation's use of coal as an alternative fuel supply to oil and natural gas. The Department of Energy notes that high unit train tariffs could act to discourage utilities both from contracting for coal and from making investment decisions to build coal burning generating plants for the use of residential and industrial consumers of electricity. It stresses that the national importance of a reasonable level of rates, attuned to the legitimate

[28] Section 101 of the 4R Act.

needs of all concerned for the transportation of large-volume coal movements, cannot be overestimated.

The particular impact of coal freight rates on the ultimate consumers of electricity in San Antonio has been placed in issue. Complainant states that charges paid for rail transportation of coal appear directly on each customer's bill as part of the monthly fuel adjustment charge. Evidence submitted in this proceeding shows that electricity consumers in San Antonio have experienced a 133-percent increase in the cost of electricity since 1972. According to the State of Texas, the average electric utility rate in San Antonio was approximately 22 percent higher than the national average, while San Antonio's electric bills are purported to rank seventh among the 40 largest cities in the United States. Although no showing was made concerning the balance between residential, commercial, and industrial electricity rates, we are satisfied that the economic impact of a transportation rate as high as that proposed by the defendants could work a significant hardship on the consumers of electricity in San Antonio.

While we cannot ignore, as a general matter, the effect which the transportation rate on coal will have in the context of the Nation's energy policy, we do not believe it would be proper to require maintenance of rail rates at an artificially low level in order to preserve an economic incentive for utilities to burn coal or to completely shield the ultimate consumers of electricity from increased costs associated with transportation of coal. Moreover, we must recognize that the Nation's energy policy may be frustrated if the railroads are not permitted sufficient revenues to make the necessary investments which will enable them to handle the anticipated increased demand for transportation of coal. We believe that these considerations support our conclusion that prescription of a rate higher than the fully allocated cost level is warranted. This, of course, brings us to the question of how much additional revenue the railroads should be permitted to earn in order to meet the 4R Act ratemaking objectives and permit the necessary investment.

MAXIMUM REASONABLE RATE

Defendant railroads contend that their proposed rate of $18.23 per ton is not the maximum reasonable rate. They request, therefore, that the Commission find the proposed rate within the zone of reasonableness for the subject traffic. Contrary to defendants' assertions, however, our restatement of the costs of

service, analysis of the rate comparisons offered in evidence, determination of a revenue need factor, and consideration of the policy matters discussed herein, indicate that the maximum reasonable rate for coal moving over defendants' lines to the City Public Service Board of San Antonio's generating plant at Elmendorf, TX, is $15.50 per ton. Updated to take into account the rail general rate increase on coal in Ex Parte No. 349, *supra* (i.e., 4 percent) we find that the present maximum reasonable rate is $16.12 per net ton. Based on our restated variable costs of $10.08 per ton, and fully allocated costs $12.65 per ton, this rate is approximately 154 to 160 percent of variable costs and 123 to 128 percent of fully allocated costs.[27]

Defendants assert in this proceeding that individual rates must be adjusted to reflect a rate of return equal at least to the railroads' cost of capital as they define that term. They argue that if the Commission is to fix the level of maximum reasonableness for a particular rate at the level of fully allocated costs, such costs must include a cost of capital of 11 percent in order to permit the raising of needed equity capital and assure the repayment of a reasonable level of debt. While we cannot fully accept defendants' argument that these capital costs should be used in computing variable costs of providng the service for the reasons discussed above, we observe that the $16.12 rate which we have prescribed substantially exceeds the variable cost level computed by defendants using an 11 percent current cost of capital.[28] This means that revenue from this service will cover the costs resulting from the service and yield a reasonable rate of return on the capital invested to provide the service. Thus, even if the current cost of capital were considered a true cost item, the variable costs of the service would be covered by the rate prescribed.

Of course, the carriers are seeking in this proceeding not simply to cover their variable costs of providing the service, but also to obtain a substantial contribution to coverage of the fixed costs of their overall operations. In this respect, the rate we are prescribing will provide a reasonable contribution. The broader issues (including more precise cost of capital findings for the railroads) will be explored in considerably greater depth in the Ex Parte No. 347, Ex Parte No. 353, and Ex Parte No. 355 proceedings.

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[27] The precise ratio differs depending on whether the costs are calculated with the rate at the Ex Parte No. 343 or Ex Parte No. 349 level. These ratios are, however, only a byproduct of other considerations outlined herein, rather than a per se test of reasonableness.

[28] This treatment is without prejudice to any change in the Commission's costing methodology that may result from Ex Parte No. 355, *supra*.

The maximum rate level we prescribe here oday is based on computation of costs adjusted to reflect a 10.2-percent rate of return as a revenue need factor. This factor is not as high as might be appropriate under other circumstances, but permits the railroads substantial additional revenue,[29] reduced to take into account the uncertainty resulting from the carriers failure to submit the evidence of actual costs and capital needs. Therefore, use of the 10.2-percent factor does not represent a formula for automatic use in other cases, but is designed to take into account the specific facts of the present situation.

As noted earlier, the railroads' widespread use of unadjusted Rail Form A costs without details of actual operating experience called for an adjustment to fixed plant investment to approximate existing conditions. Similarly, defendants have used a largely broad-brush approach in advocating an 11-percent rate of return.[30] At first blush, this position would not appear unreasonable. However, defendants have failed to address several vital issues, such as the apparently lesser degree of risk involved in handling this high-volume captive traffic. Complainants and other similarly situated bulk coal users have long-term commitments which basically tie them to particular railroad movements over an extended time period. Without additional explanation we are unable to completely endorse defendants' purported 14-percent cost of equity capital. Rather, we believe that a 12-percent (on an aftertax basis) figure is more appropriate, given the current record.[31] This produces a composite rate of return of 10.2 percent.[32]

Use of this revenue need factor also reflects a weighing of legitimate rail and public interests. If the railroads choose to publish a revised rate at the $16.12 level, a 30-percent increase in transportation cost will occur. Moreover, the record indicates that an increased traffic volume in the near future may well provide an even larger revenue contribution than here estimated. If these additional revenues increase at a rate faster than projected capital investment, defendants will realize an even greater rate of return.

[29] The $16.12 rate will result in revenue of $18 million over variable costs per year, compared to the current $6 million annual figure.

[30] This is based on an 8.1-percent cost of debt and 14-percent cost of equity capital to determine the aftertax cost of capital.

[31] Defendants are free to supplement the record to meet the objections herein. Also, should the results of Ex Parte Nos. 347, 353, or 355 dictate use of a different figure, appropriate action will be taken.

[32] Based on debt cost of 8.1 percent, a debt-equity ratio of 35:65, and an effective tax rate (7-year average) of 15 percent.

We find that a rate not exceeding $16.12 per net ton would be lawful on the basis of the existing record, and our prior finding is modified accordingly. This finding only indicates what constitutes a maximum reasonable rate level on this traffic. It is not in any sense a requirement that the railroads increase their rates on this traffic to any particular level. In view of the possible effects that a rate increase might have on complainant and its customers, we strongly suggest that defendants and complainant work together to establish a schedule for phasing in any increase that defendants choose to implement.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment.[33]

COMMISSIONER STAFFORD, concurring:

It is only with extreme reluctance that I authorize my vote for the rate of $16.62 to encompass approval of the rate of $16.12.

Had Commissioner Gresham and I held fast with Vice Chairman Christian, the Commission would be hopelessly deadlocked. In such a situation, no lifting of the present rate, $12.42, could occur. A deadlock result would cost the carriers approximately $1 million per month in lost revenues. By comparison, the difference between the two rates cited amounts to $1 million *annually*. While I, therefore, believe that the evidence fully supports a prescribed rate at the level of $16.62, my vote necessarily reflects my judgment that the existing rate is plainly too low and that it should be raised *at least* to the level of $16.12. I would, of course, go further, but I am prepared in the circumstances to allow my vote to be construed to embrace the $16.12 figure.

My disagreement with the proponents of the lower rate is simple: The so-called "error factor" of 30 percent has no foundation in fact. There is not a scintilla of evidence warranting this figure; it is nothing more than an arbitrary figure. The more logical approach is simply to acknowledge that there may be some *de minimus* overlapping of the plantsite capital attributable to this traffic with overall capital investment, which is neither precisely quantifiable or significant.

COMMISSIONER GRESHAM, concurring in part:

My analysis of the cost and revenue need evidence convinces me that $16.62 per net ton is fully justified as a maximum reasonable

[33] The cumulative impact, if any, of the western coal rate structure will be considered in Ex Parte No. 347, *supra*.

rate level. In this regard, I am in agreement with Vice Chairman Christian and Commissioner Stafford. Unfortunately, the remaining three members of the Commission are unwilling to prescribe a rate higher than $16.12. A deadlock thus, results from our voting.

If there were less at stake, I might be content to have the case placed on the shelf until the political appointive process produces a tiebreaker. In the meantime, however, the Burlington Northern would be shackled at a rate level substantially less than we all are agreed it should be. That fact and the spirit of compromise move me to climb down the ladder a few rungs. It is better we climb at least to a level we all are agreed should be reached than that we remain where we are. I, therefore, acquiesce to the construing of my vote as including approval of the $16.12 prescription.

VICE CHAIRMAN CHRISTIAN, dissenting in part:

My only reason for not joining the majority decision is my disagreement with the arbitrary reductions imposed on the prescribed rate. The 30-percent reduction in the fixed plant investment additive and the sizable reduction in the cost of equity capital are actions which have no basis in the record. Early on, the decision acknowledges that the record supports a rate prescription of at least $16.62. This rate was arrived at by computing the cost of service largely as advocated by complainant and adding to the costs a fixed plant additive and a revenue need additive. The latter two figures, which determine whether the carriers receive an adequate return on investment, have been reduced by significant amounts. The only basis I detect for reducing the rate prescription is a disdain for the carriers' negotiation and litigation tactics. While I do not condone the railroads' so-called "bait and switch" tactics or their failure to produce more evidence of actual operations, I am not prepared to use these factors as an excuse for reverting to a code of frontier justice.

Finally, my dissent in this matter should not be construed as an obstructionist position. I do not share Commissioners Stafford and Gresham's views on the effect of a deadlock. In my view, the deadlock would have been better resolved by our announcement that we were unable to reach a majority decision on a rate prescription. That announcement could have been coupled with a unanimous vote to lift the prior rate prescription which we all agreed was set too low.

It is ordered:

1. That defendants are permitted to establish a rate not exceeding $16.12 per net ton, and our prior order is modified accordingly.

2. This proceeding is dismissed, without prejudice to possible reopening based on our findings in Ex Parte No. 347, *Western Coal Investigation,* Ex Parte No. 353, *Adequacy of Railroad Revenue (1978 Determination);* or Ex Parte No. 355, *Cost Standards for Railroad Rates.*

By the Commission, Chairman O'Neal, Vice Chairman Christian, Commissioners Brown, Stafford, Gresham, and Clapp; Commissioner Stafford concurring and Commissioner Gresham concurring in part. Vice Chairman Christian dissenting in part.

H. G. HOMME, JR.,
Acting Secretary.

(SEAL)

APPENDIX A

Defendants' costs

Defendants contend that the Commission erred in the following areas:

(1) The Commission erred in determining the cost of capital applicable to the subject traffic. That is, the Commission improperly used the historic embedded debt interest rates in computing cost of capital. Defendants contend that an 11-percent (aftertax) rate is appropriate.

(2) The Commission further erred in making no allowance for the return on equity being subject to income taxes.

(3) The Commission also erred in developing the fully allocated costs on the ratio (or dollar) basis. In this regard, defendants believe that the ton and ton-mile basis is more appropriate.

The evidence of actual operating experience submitted by the railroads relates primarily to the number of cars per train, the average load per car and the yard switching requirements.

The cost study submitted by defendants is contained in the statement of its witness Marion L. Hall.

The basic unit costs utilized to determine the costs for the subject trains were taken from applications of Rail Form A (Commission Statement No. 1F1-73, "Formula for Use in Determining Rail Freight Service Cost") to the 1976 expenses and statistics of the four defendant railroads. Other items such as train crew wages were based on specific cost data. The 1976 expenses and unit costs of the railroads were adjusted to exclude the amount of monies expended during 1976 for plant capacity expansion. The direct application of this portion of the expenses will be discussed later herein.

The 1976 unit costs taken from the Rail Form A applications were increased to reflect costs levels as of October 1977. This was accomplished based on the procedure

outlined in I.C.C. Statement No. 1E3-77, "Explanation of Rail Cost Update Procedures," with one exception. The so-called employment level adjustment was not used. Defendants state that the use of this adjustment would improperly increase the employee compensation charged to operating expenses for these railroads. They point out that this adjustment is obviously intended as a productivity adjustment. However, any adjustment in operating expenses—up or down—without consideration of the resulting changes in output of service units is meaningless and without foundation. Defendants rejected this adjustment despite the fact that its use would be to the detriment of the railroads position since it would have the effect of increasing the unit costs of the four participating railroads.

Defendants computed costs per carload for the subject movements on two bases, namely: (1) costs reflecting cost of capital based on embedded interest rates, and (2) with the cost of capital adjusted to reflect 11-percent aftertax or 19.3-percent pretax cost of capital.

Defendants made various adjustments to the Rail Form A average costs to reflect operating characteristics of the subject unit train service. These adjustments were as follows:

1. *Station clerical.*—To reflect the economics of a unit-train movement, defendants reduced the clerical costs per carload by assuming that 75 percent of the cost is associated with the car and 25 percent of the cost is associated with the shipment. This is the same as the procedure used in Ex Parte No. 270 (Sub-No. 4), *Investigation of Railroad Freight Rate Structure—Coal.*

2. *Origin and destination engine minutes of unit trains.*—Defendants note that the entire time that the unit-train crew is required to remain at the loading or unloading site is classified as switching service. In developing costs for this service, defendants state that switching costs were adjusted to exclude crew wages, locomotive depreciation, locomotive cost of capital, maintenance-of-way expenses, and cost of capital for road property, since they are treated elsewhere as separate cost elements. The major remaining elements in this group of accounts are locomotive fuel, servicing of locomotives and transportation overhead accounts (except those applicable to wages which have been eliminated). These accounts were increased by the general overhead factor computed in Rail Form A. According to defendants, the unit costs for fuel and maintenance expenses were also increased on the basis of the ratio of weight of unit-train locomotives to system average yard service locomotives. The switching costs were also increased to reflect the number of units used at the time switching is performed in lieu of the Rail Form Average number of locomotive units used in switching service.

3. *Gross ton-mile costs.*—This item was adjusted to include only the maintenance-of-way and related general overhead accounts.

4. *Locomotive unit mile cost.*—This cost was also adjusted to exclude locomotive depreciation, retirements, net rents, and cost of capital. The remaining costs (primarily fuel and locomotive maintenance) were adjusted to reflect the heavier weight of the locomotives used in the unit coal trains.

5. *Crew wages—unit trains.*—Actual wages were calculated for each crew used to handle the unit trains leaving the mine origin during September 1977 and those involved in returning the empty trains. Actual crew wages presently in effect, including necessary deadheading, were adjusted to allow for vacation and holiday pay, transportation and general overheads, and for the nonrevenue factor to reflect a pro rata share of nonrevenue expenses.

6. *Other train-mile costs.*—This item was adjusted to exclude depreciation, retirements, and rents, and cost of capital for cabooses.

7. *Switching-other than unit trains.*—This service involves switching by yard engines, which includes switching of bad order cars, cabooses, slave or remote control diesel units, and turning of train every other trip to prevent excessive wheel wear to one side of the freight cars. Based on field studies (September 12 through 18, 1977), the minutes per loaded or empty train for this type of switching were determined as shown below:

		Minutes
Alliance	BN	85
Denver	BN	45
Amarillo	FWD	17
Fort Worth	FWD	50
San Antonio	SP	60

8. *Enroute switching by unit trains.*—Forty minutes for unit-train switching of bad order cars at points other than origin, destination, or those points described above was allowed by defendants. They state that this is the same procedure as allowed by the Commission in the *Smithers Lake*[1] decision.

9. *Railroad owned car costs.*—Defendants state that the applicable tariff provides for the carrier to furnish equipment to replace shipper/consignee owned cars which are damaged, destroyed, or derailed, requiring removal from service. A study of the subject trains (May 1 to October 31, 1977) showed that 383 railroad-owned cars (or 2.84 percent of the total cars) were used in the subject movement. Defendants' costs include the applicable per diem and mileage costs for such cars.

10. *Helper service.*—Defendants note that unit trains leaving the mine must be assisted by a helper crew during the fall and winter months (approximately 6 months per year). This crew operates with one locomotive unit and pushes the train for 10 miles (20 miles round trip.) These unit trains are also helped at Crawford, NE, by a crew with three locomotive units (round trip of 26 miles). Cost included for these two crews are based on each crew helping four trains in an 8-hour work day.

The final step in preparation of defendants variable cost exhibit involved increasing the cost of capital from the embedded interest rates to an 11 percent aftertax current cost of capital. This was accomplished by application of the following ratios to the total cost of capital for each railroad as calculated by use of Rail Form A unit costs:

	Rail Form A interest rate	Ratio of 19.3 percent pretax rate to the embedded interest rate
	Percent	
BN	5.469	3.5290
C&S	5.024	3.8416
FW&D	5.621	3.4336
SP	5.674	3.4015

[1]Docket No. 36608, *Incentive Rate on Coal—Smithers Lake, Texas.*

In addition to the above, defendants claim that the subject traffic necessitates inclusion of incremental costs for new locomotives and cabooses, maintenance-of-way costs in addition to system average expenses, and additional investment in fixed plant. These items are discussed below:

1. *Locomotive and caboose cost of capital and depreciation.*—In developing the locomotive and caboose capital cost and depreciation, defendants used a costs of $490,000 for a locomotive unit and $43,000 for a caboose. These are the same as were used in the original San Antonio proceeding. Nonetheless, defendants note that the cost of the locomotives actually employed for the Elmendorf trains (based on a 3-month study) was $398,906. By a series of computations, defendants determined that 8.66 locomotives per train set are required. Since seven sets of equipment are purportedly utilized, defendants state that a total of 60.62 locomotives are required to provide the subject service. Moreover, eight cabooses are also required. This reflects one caboose for each train set plus one for contingency purposes.

After developing the total cost of equipment, defendants used an annuity formula to spread the investment cost and the cost of capital over the useful life of the equipment in equal annual installments. The annuity was based on the 20-year life for cabooses and a 15-year life for locomotives. After determining the anpual cost by use of the annuity formula, the cost was separated into the depreciation and the cost of capital components. Each component was then divided by the annual tonnage which would be handled in the subject trains (depreciation was increased for general overhead) to produce unit costs per ton. The development of these cost elements can be seen on defendants' exhibit MLH-5.

2. *Additional maintenance-of-way costs.*—Defendants have computed costs of 11.0 cents (BN, C&S, and FW&D) and 11.7 cents (SP) for additional maintenance costs which results from operation of the Elmendorf coal trains over the tracks of the involved railroads. These costs purportedly reflect the effect of heavy wheel loads on the maintenance of track structures. Defendants state that this procedure is the same as that followed in *Cochise* (Docket No. 36612, *Incentive Rate on Coal—Cochise, Arizona*).

3. *Additional investment in fixed plants.*—Defendants contend that the development of large volumes of coal traffic handled by western railroads has resulted in extensive expenditures in additional plant investment by these carriers. Additional expenditures in fixed plant investment made during 1976 were accepted in the Commission's original *San Antonio* decision. Such expenditures for both 1976 and 1977 were also accepted in the *Smithers Lake* and *Cochise* decisions. Defendants state the same methodology was used herein. The development of this cost item can be seen on defendants' exhibit MLH-7.

Cost summary.—Defendants, in exhibit MLH-8, provide a summary of its variable costs computations, developed as described above, plus the application of constant costs on a ton and ton-mile basis as well as the so-called "ratio" basis. In the first *San Antonio* decision, the Commission adopted the ratio basis for application of constant costs. This was purportedly due to the lack of information upon which to base the ton and ton-mile application of constant costs. Defendants contend that the Commission's application of the ratio method was incorrect since the ratio utilized was taken from a Commission publication and is not specifically applicable to the variable costs of the four involved railroads. Also, it is alleged, that the ratio was improperly applied by the Commission to total expenses and cost of capital. Defendants state that the ratio should be applied to the expense factors from Rail Form A, and cost of capital

investment in road property should be doubled since it is 50-percent variable in the formula.

Defendants contend that in determining maximum reasonable rates, the ratio method should not be used. This is because the level of constant costs produced using this method is much lower than the ton and ton-mile basis on traffic which is heavier than system average traffic.

The results of defendants' cost study and a comparison of the resulting costs with the proposed rate is shown below:

	Cost per ton
Variable	$14.416
Fully allocated:	
Ton and ton-mile basis	22.454
Ratio basis	18.382
Proposed rate	18.23
Ratio of proposed rate to costs:	
Variable----------(percent)	126.5
Fully allocated:	
Ton and ton-mile basis----------(percent)	81.2
Ratio basis----------(percent)	99.2

In addition to the above costs, defendants also developed costs using procedures accepted by the Commission in the *Cochise* and *Smithers Lake* decisions. These costs reflect the Rail Form A embedded cost of capital for operating expenses, and an adjusted embedded debt rate was applied to investment in locomotives and cabooses. This computation produced the following rate/cost comparisons:

	Cost per ton
Variable	$12.046
Fully allocated:	
Ton and ton-mile basis	20.084
Ratio basis	14.802
Proposed rate	18.23
Ratio of proposed rate to costs:	
Variable----------(percent)	151.3
Fully allocated:	
Ton and ton-mile basis----------(percent)	90.8
Ratio basis----------(percent)	123.2

Defendants did not provide a detailed discussion as to how these costs were computed other than stating that it followed the same costing procedures as in the *Cochise* and *Smithers Lake* decisions.

III. COMPLAINANTS EVIDENCE

Complainant states that despite the fact that the primary purpose of this proceeding is to examine the degree to which modifications of the Commission's original findings would be justified on the basis of actual operating characteristics, defendants have chosen to submit virtually no evidence relating to "actual operating experience." Only the number of cars in the train, the average load per car, and the yard switching requirements have been derived from records taken from actual operating experience.

Complainant states that balance of defendants' data is made up of estimates, assumptions, and unsupported projections of the same variety they relied upon in the original proceedings.

Complainant claims that defendants made numerous costing errors in the development of its cost study. Consequently, complainant has undertaken a restatement of defendants' costs, a description of which follows. According to complainant many of the errors, or differences between defendants' costs, and complainant's costs result from defendants' unjustified use of an 11-percent aftertax rate of return and its improper indexing method.

1. *Locomotive unit-mile costs.*—After exclusion of capital costs (rents, depreciation, retirements, and return on investment (which are treated separately)) each railroad's system average diesel unit-mile expense, consisting primarily of fuel and maintenance, was adjusted by defendants to reflect the heavier than average weight of the locomotives used in the unit-coal trains. Complainant states there is no evidence to support such an adjustment. The weight of the locomotive is not the determinant of locomotive repair, servicing, or fuel expenses. Although locomotive expenses are both time and mileage related, such expenses are treated solely on the basis of mileage under Rail Form A procedures. The higher utilization of locomotives in unit-coal train service would reduce rather than increase unit costs. Complainant states that utilization of locomotives in the subject service is almost double that of the system average (120,854 annual miles per unit vs. 68,562-BN and 69,274-SP system average annual miles per unit). Expenses which are a function of time (inspection for example) would be reduced for unit-train service. Furthermore, complainant argues that fuel, which accounts for some 30 percent of locomotive expenses, would be consumed more efficiently in unit-coal train service, because power is assigned base on known trailing gross tonnage.

In complainant's restatement, it used system average unit-mile costs for each of the involved railroads adjusted to exclude capital costs which are treated separately.

2. *Crew wages.*—Complainant's restatement of the railroads crew wage costs is based on the basic time and mileage rates effective July 1, 1977. Basic wages were increased to reflect constructive allowances and Rail Form A transportation and general overheads, and were applied separately to local and through trains as identified by defendents.

Complainant states that a review of the workpapers underlying defendants' calculations revealed the following errors and inconsistencies:

(1) September crew wages were not shown to be representative of average annual operating experience;

(2) Defendants failed to adjust the costs to reflect the 97 percent Rail Form A variability factor associated with train crew wages;

(3) BN developed constructive allowances, overtime vacations, et cetera, for a judgment sample of crews. Complainant states that a large portion of this allowance is attributable to deadheading. Deadheading is a function of all trains in a crew district and should be treated in total as an overhead rather than assigning deadheading costs to a specific train. Further as BN constructive allowances are based on a judgment sample, the potential for bias cannot be determined. It appears that C&S and FW&D followed procedures similar to those used by BN. SP's constructive allowance is overstated because it developed a ratio of straight time and applied it back to both straight time and overtime wages. Further, BN used a 7.25-percent additive for

vacation allowances based on "Circular No. GMA-4423-3" dated June 15, 1976. Effective July 1, 1977 Circular No. GMA-4423-6 indicates that vacations decreased from 7.25 percent to 7.00 percent.

Complainant, in its restatement, included constructive allowances based on the carriers' annual average experience. This is the same procedure as used in the original *San Antonio* case; this procedure purportedly eliminates the problems of bias and properly spreads deadheading to all involved crews;

(4) Defendants supposedly developed crew wages for each crew utilized in handling the unit-coal trains based on a study of trains leaving the mine during September 1977. However, seven trains were excluded from this study with no explanation. An amount of $356.24 was added for C&S service between Denver and Pueblo, CO. No explanation or support was provided for this item. Further, no workpapers were provided to support the SP wage analysis;

(5) BN family lines crew wages were estimated for 18 crews. No explanation or support was provided for such estimates; and

(6) Time slips provided by defendants purportedly include all train and enginemen actually working on the trains. However, BN included an additive of $338 or $19.88 per train for trainees. No workpapers or time slips were provided in support of this additive. Further, on 23 FW&D crew districts, time slips for "apprentice engineers" were included. For the SP, defendants included $1,737.59 or $82.73 per train for what was termed relief crews. Again, no workpapers were provided in support of this additive. The SP Fort Worth/Ennis crew operates in turnaround service. Therefore, only one-half the crew wages in each direction are assignable to the subject movements, whereas defendants included the total amount.

3. *Yard switching.*—Complainant has accepted defendants' calculation of the number of yard switching minutes per carload.

4. *Switching-unit train.*—Under this category, complainant notes that defendants included an allowance for bad order switching while on the BN only. Defendants allowed $.50 per carload based on 40 minutes per carload for .85 bad order set outs per train. Complainant argues that no support was offered for inclusion of this item, except as noted by defendants, and that the 40 minutes was taken from the record in the *Smithers Lake* case. Complainant states that defendants' switching study already includes an allowance for both yard and unit-train switching and more than allows for this claimed switching by unit trains.

5. *Station clerical.*—In its restatement of defendants' costs, complainant used the latest Commission Burden Study to determine the adjustment of station clerical costs applicable to coal traffic, *e.g.*, 47 percent of system average station clerical costs.

6. *Special services.*—Complainant states that furnishing of grain doors constitutes a significant portion of this cost. However, it notes that neither this item or any other services included under this category of cost is applicable to the subject movement.

7. *Loop track movement.*—Complainant notes that even though the purpose of this reopened proceeding was to recognize actual operating experience, the costs shown by defendants for this item at origin and destination are not based on actual operating data but upon tariff allowances. Defendants also adjusted this item to reflect increased repairs and fuel based upon the weight of the locomotive. Complainant states that as noted previously, there is no support for defendants' thesis that there is a relationship between locomotive weight and repair expenses per minute or per mile. Further, it states that if any adjustment is made to recognize this service, then it should be based on the additional mileage run by the locomotives in performing the loading and unloading of the train. Complainant's restatement contains such an adjustment.

8. *Loss and damage.*—Complainant notes that defendants based their loss and damage claim payments on the AAR 1976 average claim payments rather than on actual data for the subject traffic. Complainant used loss and damage claim expenses based on evidence introduced by the railroads in docket No. 36579, *Houston Power and Lighting Co.* v. *Burlington Northern Inc.*, dismissed February 1, 1978.

9. *Locomotive capital costs.*—Complainant states that defendants have followed the same procedures which they tried in the initial proceeding to establish their locomotive capital costs. That is, they have directly assigned to the San Antonio trains claimed capital costs, which includes both return on investment and depreciation, based on 1976 prices of locomotives. Further, they have excluded salvage value, assumed a 15-year life, and amortized the capital investment at an annuity rate of 0.193. This annuity rate assumes a capital cost of 11 percent aftertaxes based on a statutory tax rate of 48 percent, or 19.3 percent capital factor before taxes for the locomotives which defendants have attributed to San Antonio's trains.

Defendants' methodology assumes that 60.62 locomotives would be required for the San Antonio service and that they would be purchased new at 1976 prices. Complainant contends that it would be "pure folly" to assign such locomotives to a specific train. That is, it would be more desirable to have a large pool of locomotives which would provide for flexibility that would otherwise not be available. Also it notes that while certain locomotives may be more efficiently used in particular types of service, they are used interchangeably. Moreover, complainant states that the methodology urged by defendants, of assigned locomotives, is refuted by their own operating witness. This witness offered the results of a 1-month analysis of the actual locomotives used on the San Antonio coal trains. This analysis indicated that BN family locomotives utilized in the San Antonio service were actually built between 1969 and 1977. In other words, they came from the locomotive pool and were not all purchased new.

In addition, complainant points out that the number of locomotive units (60.62) claimed by defendants as required for this service is based on a claimed requirement of 8.66 locomotives per train and seven train sets. The 8.66 units per train set was derived by dividing the system annual diesel unit miles required per train set for the San Antonio service by the average diesel unit miles of units used in coal train service (92,016 miles per year).

Complainant states that this method of calculating locomotive units is totally improper. First, the alleged 8.66 units per train do not agree with defendants' own calculations which indicate that only 5.98 units would be required per San Antonio train set (actual September experience shows 5.85 units). Secondly, defendants' method implicity assumes that all locomotives run the same number of miles per year, which is not the case. Complainant states that even by defendants' own figures, annual utilization of locomotives used in San Antonio service will exceed the 92,016 miles per year (used to develop the 60.62 units) by 26 percent. For example, defendants have shown that each unit on each train runs 40.38 trips per year. Thus, when this figure is multipled by 3,302 round trip miles, it results in an annual utilization of 133,335 miles before consideration of spares. After consideration of spares of approximately 8 percent, annual utilization is reduced to 123,458 miles, which is considerably larger than the 92,016 miles calculated by defendants. In summary, complainant states that defendants have engaged in a needless exercise of constructing the locomotive units from alleged mileage rather than simply using the actual number of engines on the trains.

In its cost restatement, complainant used the results of defendants' study of trains originating at the mine during September 1977 which indicated that the actual average train had 5.85 diesel units. Thus, seven trains would require 40.95 units. Based on a spare margin allowance of 8 percent, the total fleet would require 44.23 diesel units and not 60.62 units as claimed by defendants.

Finally, complainant notes that defendants have used an estimated cost of $490,000 per unit in calculating locomotive capital costs. On the other hand, complainant, in its cost restatement, has used the average cost of locomotives actually used in San Antonio service of $398,906 per unit. This latter figure was purportedly calculated by defendants on the basis of their 3-month test period (not identified).

The following shows a comparison of the locomotive capital costs per carload as computed by defendants and complainant.

	Defendants	*Complainant*
Expenses (depreciation)	$73.06	$24.80
Return-equipment	136.41	28.11
Total	209.47	52.91

10. *Caboose capital costs.*—Complainant states that the procedures used by defendants in developing caboose capital costs are the same as those described above. Complainant accepted defendants' cost of a new caboose of $43,000, and both defendants and complainant have used a total of seven cabooses with a spare margin of one. Caboose capital costs, as computed by complainant, are 1.3 cents per ton less than those developed by defendants.

11. *Roadway maintenance (heavy wheel load).*—Complainant initially pointed out that defendants have included a maintenance-of-way additive purported to reflect the impact of heavier weight on wheels. This added 33.50 per carload or $.33 per ton.

Complainant, on the other hand, used the system average maintenance-of-way costs which consider all the variables which affect the level of roadway maintenance.

In support of their adjustment, defendants refer to a study made by the Federal Railroad Administration. Complainant states that this study however, identifies many factors which contribute to deterioration of railroad roadway such as tonnage rail type and weight, train speed, gradient curvature and oilers, wheel loads, and type of train service. Defendants' adjustment, on the other hand, only considers tonnage and wheel loads. Complainant states that if only the speed factors from the FRA study (along with the weight factors) were considered, the actual impact on the costs would be negative 6.21 cents per million gross tons (MGT) as opposed to the additive of 11.68 cents per MGT computed by defendants. As a result, complainant states that it has used Rail Form A average maintenance of way costs rather than lower its costs as the proper application of the adjustment described above would indicate.

As a result of further discovery, complainant restated the roadway maintenance cost per ton based on the maintenance-of-way expense data per ton by line segment supplied by defendants. The maintenance-of-way expense by line segment were assigned to the San Antonio traffic based on the percentage of the San Antonio gross tonnage to the total estimated gross tonnage handled over the various lines during 1978. The total 1977 variable maintenance-of-way expenses assigned to San Antonio, computed, including overheads, was then divided by the total annual tonnage (3

million) and then multiplied by the average tons per car (100.4) to arrive at an "actual" maintenance-of-way cost per carload of $145.75 applicable to the subject traffic during 1977. An amount of $284.03 was previously included in complainant's calculations for this element of cost based on Rail Form A system average data.

12. *Fixed plant investment.*—According to complainant, defendants have also included an additive to conventional Rail Form A variable costs. That is, defendants have used an incremental or added traffic costing theory in developing their investment in roadway property. Complainant states that this procedure results in double counting the investment. This comes about because rather than removing the cost of capital for roadway which is contained in the conventional calculation of Rail Form A variable costs and which is allocated by the mechanics of the formula to San Antonio's costs, the defendants have simply added on to such cost an additional amount claimed to be the new incremental expense under their added traffic approach. Thus, complainant states that the variable costs as calculated by defendants include both a pro rata share of the system capital costs associated with 50 percent of the existing net investment in road property, plus the entire new capital costs claimed to be associated with all of the incremental road property investment attributed to the subject traffic.

Complainant contends that the failure of defendants in their application to remove the cost associated with the existing roadway which are allocated via Rail Form A is totally inconsistent with defendants' incremental theory. Complainant further contends that if the incremental traffic is to be held responsible for all new investment which it causes, then clearly it cannot be held responsible for the existing investment. The capital costs for that investment must be borne by the existing traffic.

13. *Indexing.*—Complainant states that defendants in indexing costs based on I.C.C. statement No. 1E3-77, *supra*, procedures, misapplied the materials and supplies indexes. Complainant cites the following from I.C.C. statement No. 1E3-77 (page 1):

The average inventory lag for fuel of one month and for other materials and supplies of three months must be taken into account. Thus, in the computation of the April 1977 update ratios the quarterly index of spot prices of materials & supplies (excl. fuel) for January 1977 is selected because materials and supplies (excl. fuel) purchased in January are consumed, on the average, in April.

Defendants, in indexing costs to an October 1, 1977 level, have used the October index for materials and supplies. Complainant argues that the October index is incorrect, since it fails to recognize the lag explained above. In addition, complainant states that there are other errors less significant in defendants' indexing calculations. These include the omission of account 360 in the accounts not indexed and failure to consider net rents.

Complainant states that it agrees with defendants that the use of employment level adjustment is inappropriate.

Summary of defendants and complainant's restated variable cost computations

A summary of the variable costs as computed by defendants and restated by complainant is shown below:

Summary of variable costs per ton

	Cost component (1)	Defendants (2)	Complainant (3)
1.	Gross ton-mile costs	$6.798	$5.528
2.	Locomotive unit-mile costs (excl. locomotive capital)	2.064	1.419
3.	Wage costs	1.477	1.285
4.	Train-mile other (excl. caboose capital)	.302	.297
5.	Car inspection	.180	.178
6.	Train supplies-running	.166	.164
7.	Switching	.077	.070
8.	Car repairs-user	.127	.126
9.	Railroad owned car costs	.055	.048
10.	Switching unit train	.005	------
11.	Helper service	.019	.011
12.	Station clerical	.146	.083
13.	Claims clerical	.020	.018
14.	Special services	.005	------
15.	Loop track movement	.054	.006
16.	Loss and damage payments	.019	.008
17.	Locomotive capital	2.086	.527
18.	Caboose capital	.023	.010
19.	Additional maint. of way	.334	------
20.	Fixed plant investment—1976	.208	------
21.	Fixed plant investment—1977	.249	------
22.	Variable costs per ton	14.414	9.778

Complainant did not develop costs at the fully allocated level.

IV. *Comments*

Both defendants and complainant have used 1976 applications of Rail Form A to the expenses and statistics of the four participating railroads. While the actual applications of this formula were not introduced into the record, there was no controversy between the parties in this respect. Therefore, we can assume that these Rail Form A applications, in developing the system average unit costs, were appropriately prepared.

The 1976 Rail Form A average unit costs were adjusted, by both parties, to the October 1977 level using procedures described in I.C.C. statement No. 1E3-77, *supra*. Neither party used the employee level adjustment described therein. This is not a significant factor in this proceeding as its effect would be minimal. Also the use of this adjustment would produce slightly higher costs which would be to defendants' advantage. However, in employing the above update procedures, defendants improperly misapplied the materials and supplies indexes, as criticized by complainant. This error relates to defendants' failure to take into account the average inventory lag for fuel of 1 month and for other materials and supplies of 3 months.

Defendants also erred in their exclusion of certain items in the development of their indexes. The effect of these errors, however, is not significant.

The different consideration given to cost of capital accounted for the major difference between defendants and complainant in the development of the variable costs.

In developing their costs, defendants included cost of capital items based on a 19.3 percent before-tax rate of return. Complainant, on the other hand, computed the cost of capital items based on the embedded debt rates in accordance with standard Rail Form A procedures. From a cost standpoint, complainant's procedure correctly develops the cost of capital. With respect thereto, the following is excerpted from *Rules to Govern Assembling & Presenting Cost Evidence*, 337 I.C.C. 298, 393. "Allowances for return on investment *** to extent they are admittedly intended to serve as an encouragement and incentive for continued or new risk bearing ownership, are in the nature of so-called pure economic profits and should not be taken into account as an element falling within the restrictive construction to be given here to costs. This is not to say, however, that such an allowance for profit is not to be considered as a factor in ratemaking. ***However, this so-called pure profit should be clearly distinguished from opportunity costs. The latter does not include a return on investment, simple, in the sense of, and as the equivalent to, cost of capital, but in no way connected with the risk or incentive of ownership. It is with respect to this limited effect to be given to return on investment as an element of cost that the examiner generally agrees with the explanation of the cost finding section as to why equity capital invested in carrier facilities should be treated in the same manner as similar debt capital." Based on the preceding excerpt, cost of capital computed at a higher rate (than the embedded debt rate) may be allowable, not from a cost standpoint, but from an allowance for profit or revenue need standpoint.

Numerous errors and deficiencies in defendants' cost study are apparent. Some of these are based on costing theories initially propounded by defendants (and rejected by the Commission) in the original *San Antonio* proceeding. A discussion of these discrepancies with respect to specific cost items follows:

1. *Station clerical.*—Defendants adjusted this item of cost in accordance with an adjustment described in Ex Parte No. 270 (Sub-No. 4), *supra*. Complainant's adjustment of this item was derived from I.C.C. statement No. 153-72, "Rail Revenue Contribution by Commodity and Territory for the Year 1972." In this instance, complainant's adjustment factor is more appropriate. This factor was developed in statement No. 153-72, *supra*, based on the relationships of two iron ore carrying railroads to the regional average in the western district. This factor is likewise applicable to coal movements inasmuch as iron ore and coal have similar operating and billing characteristics. Defendants' adjustment, on the other hand, was based on Ex Parte No. 270, *supra*. The adjustment in that proceeding was derived from a study of all commodities and represents a U.S. average factor. Use of complainant's factor would develop costs which would more nearly approximate the actual costs incurred herein. It should be noted that the difference between the two methods only amounted to $.063 per ton.

2. *Crew wages.*—Rather than use Rail Form A average data, defendants made a special study—attempting to develop actual crew wages applicable to the subject traffic. This study, however, contains several deficiencies which include the following:

a. The study covered only 1 month's operations—September 1977. No attempt was made to establish that this month represented an average of the annual level of employment. Consequently, it is not unreasonable to assume that data for this month would not reflect seasonal or monthly fluctuations in the level of employment.

b. Defendants' study did not reflect the variability factor applicable to crew wages. Constructive allowances were based on a judgment sample which was not shown to be valid. Vacation allowances for BN were overstated due to use of an outdated factor. Several trains were, with no explanations, excluded from the study. Rather than use actual data, crews wages for 18 BN crews were estimated. Additions for trainees, apprentice engineers and relief crews were included with no supporting time slips.

In view of these deficiencies, we must conclude that defendants' study of crew wages is of little value in depicting the actual crew wages involved.

As noted previously, complainant's restatement of this item reflects basic time and mileage rates as of July 1, 1977. These rates, adjusted to reflect annual average constructive allowances and Rail Form A overheads, were applied to the local and thru trains as identified by defendants. In view of the deficiencies cited in defendants' crew wages study, it appears that complainant's study reflects the best data of record.

3. *Special services.*—Defendants included the Rail Form A average for this item of $.005 per ton. Complainant excluded this item completely. As can be seen, the difference in the costs is insignificant. However, special services covers many different services, most of which are not applicable to unit-train coal movements. This item reflects primarily the cost of furnishing grain doors, closing hopper doors and removing dunnage, which obviously are not associated with coal traffic. Although a small portion of this item relating to inspection and general policing may be applicable to coal traffic, we nonetheless, believe complainants exclusion of this item is more reasonable than defendants' inclusion of the full average Rail Form A amount.

4. *Loop train movement-origin and destination switching.*—Defendants adjusted this cost to exclude crew wages, maintenance-of-way and structures, locomotive depreciation and cost of capital items which are treaded as separate cost items. The remaining expenses were then adjusted to reflect the size of the unit-train locomotives and for the number of locomotives used. In development of this cost item, defendants relied on the tariff allowances for loading and unloading rather than actual experience. Defendants have not shown that the tariff free time allowed is the same as the actual time spent at origin and destination for switching the subject coal cars. Tariff free time only denotes the time allowed before demurrage starts to accrue, and not necessarily the actual switching time involved.

Also defendants adjustment of this cost to reflect the size or weight of the locomotives used has not been adequately supported. It is not unreasonable to assume that because of the larger locomotives the railroads may incur additional expenditure for repairs and fuel. However, the ultimate unit cost would not necessarily be greater than the average since the efficiency and utilization of these locomotives is likewise higher than that of the "system average" type of locomotive. Thus the higher efficiency and the greater utilization would have a tendency to cancel out the increased expenses in the development of the unit costs.

Since the loading or unloading on the loop track is provided by the road locomotives in pull-through train service rather than being handled by switch engines, it appears that complainant's cost for this service based on the additional miles involved would more closely reflect the actual costs incurred by the railroads for the subject unit trains.

5. *Locomotive unit-mile costs.*—The same comments made immediately above are applicable to this cost item. That is, defendants also adjusted this cost to reflect the heavier than average weight of the locomotives, which we have rejected above. It should also be noted that weight is not the only factor to be considered in adjusting the fuel and locomotive maintenance expenses. Defendants' adjustment, that reflects only differences in the weight of the locomotives, does not consider other factors such as horsepower, age of locomotives, and type of locomotives, which would also influence the locomotive unit mile costs.

Complainant's system average costs adjusted to exclude the capital costs are more appropriate.

6. *Loss and damage.*—Again with this item the actual cost was not developed or provided by defendants. Defendants used the AAR 1976 average claim payments for coal. Complainant states that its loss and damage cost was based on data from docket No. 36579, *supra.* No further explanation or support was offered by complainant. It is noted, however, that this proceeding was dismissed on February 1, 1978. Since actual data is not available and since complainant offered no support for its factor, we accept defendants' use of the AAR average loss and damage cost herein.

7. *Unit-train switching.*—Defendants included under this heading an allowance for bad order switching for BN's portion of the movement. The only support for this item was that it was taken from the record in the *Smithers Lake* case. We must reject this item of cost since it is not based on actual operating experience and no data were presented to indicate that this allowance is appropriate for the subject traffic. In other words, even if defendants had shown that the switching allowance was appropriate in the *Smithers Lake* case, it has not been shown to be appropriate in the instant proceeding.

8. *Railroad-owned car costs.*—Defendants erred in the development of this item in their application of the general overhead ratio to the per diem time and mileage rates. These rates already consider the general overhead expense in their development.

9. *Locomotive and caboose cost of capital and depreciation.*—For this cost item defendants have used the same type of procedures which they propounded in the original *San Antonio* proceeding and which were rejected. First, there is no evidence to support defendants' theory of assigned locomotives to the subject service or that only new locomotives would be used. Defendants' own evidence indicates that the locomotives actually used in performing the subject service were built between 1969 and 1977.

Further, defendants costs are based on a cost per locomotive unit of $490,000. This represents the 1976 price per locomotive, whereas the cost of the units actually used averaged $398,906 per unit. Defendants' calculations also assume that 8.66 locomotives are required per train set. This factor is not based on actual experience and is, in fact, invalid. In developing this factor, defendants utilize the system average annual utilization of all locomotives rather than the much higher utilization of the units actually used in the subject service. Use of the actual utilization factor produces a number of units required per train set of 5.85 units.

On the other hand, complainant's costs for this item more nearly approximate the actual costs for the subject service. Complainant used the same procedures as were accepted in the original *San Antonio* proceeding, as well as in the *Smithers Lake* and *Cochise* proceedings. Complainant's use of a capital cost factor of 7.85 percent is the same as that accepted in these proceedings.

The primary difference in the parties computation of caboose capital costs and depreciation is based on the different return factors used. Again the 7.85-percent

return factor used by complainant, more nearly approximates the embedded debt rate than the 19.3-percent factor used by defendants.

10. *Additional maintenance-of-way costs.*—Again, as in the original *San Antonio* proceeding, defendants have included an additive for alleged additional maintenance-of-way costs. These costs were rejected in the prior proceeding and are again rejected here. As was noted previously, if an additive for this item were valid, the appropriate method would be first to exclude all costs in the Rail Form A system average data relating to maintenance-of-way. Only then could a cost be constructed relating solely to the lines over which the subject traffic moved. This cost should then be apportioned among the subject traffic and all other traffic which utilizes the lines. Defendants have failed to do this. Further, their adjustment is not based on any evidence of actual operating experience.

Defendants adjustment of this item is based on a study conducted by the Federal Railroad Administration. Defendants, however, used only the portion of that study which dealt with heavy wheel loadings. As noted by complainant, if the speed adjustment from that study were used in addition to the heavy wheel loading adjustment, the net result would be a negative adjustment to the maintenance-of-way cost as opposed to defendants' cost additive.

Complainant's original costs, which are based on the system average maintenance-of-way experience, are considered the best evidence of record for this item.

The procedures subsequently employed by complainant in developing its revised maintenance cost per ton, however, are deficient in several respects. This cost is based on actual expenses supplied by defendants, adjusted to reflect the variable factor, and appropriate overheads. The costs were indexed to the October 1, 1977 level. The costs were assign to the San Antonio traffic based on the percentage of San Antonio traffic tonnage to the total estimated gross tonnage moving over the lines during 1978. The 1978 tonnage figures are, as noted by defendants, projected estimates. The appropriate procedure here would be to use the actual 1977 tonnage figures since these would correspond to the 1977 expense figures supplied by defendants. The 1977 tonnage figures are not yet available according to defendants. In view of this, it is impossible to ascertain with any degree of certainty the appropriate assignment of the expenses to the traffic at issue herein. Since the actual 1977 tonnages are not yet available, it would be impossible to speculate as to what the effect on the costs would actually be.

In addition, complainant's procedures do not develop a maintenance cost applicable solely to the subject traffic. These procedures merely develop a weighting of the average cost applicable to all traffic moving over the subject lines. No data have been submitted whereby it could be determined the amount of maintenance expense which has been occurred solely from handling the subject traffic.

Finally, the maintenance-of-way expenses provided by defendant were only for the year 1977. The subject traffic has not been moving for a sufficient period of time, nor do the expenses for only 1 year reflect a sufficient period of time to determine what the appropriate average or normalized maintenance-of-way expense would be on the subject lines.

In summary of the above, we believe that the data supplied by defendants and used by complainant in its restatement, fails to adequately support complainant's contention that the maintenance-of-way element of cost is actually less than the system average amount.

11. *Additional fixed plant investment.*—As discussed in the decision, we have determined that inclusion of an additive to the costs to reflect the additional

investment in fixed plant, occasioned by institution of the subject traffic, is appropriate. The procedures used by defendant in developing this cost item reflected an after tax capital cost fact of 11 percent. As discussed in the decision a 10.2-percent return factor was found to be appropriate, and a 30-percent cutback factor should be used to approximate actual conditions and to correct an overstatement resulting from inclusion in the system average expense. Accordingly, we have revised defendants calculations and find that an amount of 29 cents per ton is the appropriate amount to be included herein for additional fixed plant investment.

12. *Constant costs.*—Discussed in decision.

Total costs

Based on the comments contained in the decision and based on the best of record, the correct costs at the October 1977 level for the subject movements are as follows:

Variable costs	
Per ton	$ 10.8
Fully allocated costs (dollar basis)	
Per ton	$12.65

13. *The rate.*—The $15.50 rate was calculated as follows:

(1) Rail Form A costs per ton, which were incurred by the four railroads involved in handling the subject traffic, amounted to $9.79 (variable) and $12.36[1] (fully allocated), based on the best data of record. These costs reflect cost of capital items based on embedded debt interest rates of the carriers except that locomotive and caboose capital costs for new equipment were based on a rate of 7.85 percent. (2) To the respective variable and fully allocated cost, an amount of 29 cents per ton was added to reflect additional fixed plant investment occassioned by institution of the subject traffic. This amount was computed in the same manner as computed by defendants. However, the additive reflects a 10.2-percent return factor rather than the 11-percent factor used by defendants. Inclusion of this item adjusts the costs of $10.08 (variable) and $12.65 (fully allocated) per ton. (3) The Rail Form A capital cost elements (which reflected the embedded debt interest rates of the carriers[2] were adjusted to reflect a 10.2-percent aftertax rate of return. This was accomplished by calculating ratios of the pretax rate of return (corresponding to a 10.2-percent aftertax rate of return) to the embedded debt interest rates of the individual railroads. These ratios were then applied to the Rail Form A road and equipment return elements. This procedure had the effect of adding $1.76 and $2.85 per ton, respectively, to the levels described in item (2) above.

This produced a total of $11.84 and $15.50 per ton, respectively.

The following is a summary of the above:

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[1]Fully allocated costs were determined by applying ratios of fully allocated to variable costs supplied by defendants to the variable costs of each of the railroads as follows: BN-1.22300; CS-1.27596; FWD-1.22207; and SP-1.21278.

[2]Excluding the additional fixed plant investment, to which the 10.2-percent rate had already been applied.

		Per ton	
		Variable cost level	F.A. cost level
1.	Rail Form A costs	$9.79	$12.36
2.	Fixed plant investment additive	.29	.29
3.	Total costs	$10.08	$12.65
4.	Adjustment of Rail Form A costs to reflect 10.2 percent revenue need factor	1.76	2.85
5.	Total	$11.84	$15.50

APPENDIX B

Western unit train coal movements (Rates as of December 1, 1977)

Origin/destination	Date of base rate quotation	District (miles)	Annual volume (tons in thousands)	Tons/ train (tons)	Load (hours)	Unload (hours)	Rate/ tons ($)	Rate/ T-M (mills)
Old rates:								
Belle Ayr, WY/Pueblo, CO	January 19, 1971	595	1,670	10,500	4	6	4.55	7.65
Dana-Hanna, WY/Sergeant Bluff, IA	February 1, 1971[a]	729	1,100	9,500	4.5	5-9	4.91	6.74
Dana-Hanna, WY/Kansas City, MO-KS	February 3, 1972[a]	757	800	9,000	4	10	4.84	6.39
Belle Ayr, WY/Welsh, TX	May 18, 1972	1,454	1,650	10,500	4	5	10.65	7.32
Kuehn, MT/Columbia, WI	July 10, 1972	1,026	2,000	8,500	4	4	7.15	6.97
Dana-Hanna, WY/Oak Creek, WI	August 31, 1972[a]	1,163	750	11,000	4	6	9.28	7.98
Belle Ayr, WY/Jeffrey, KS	November 30, 1972	702	2,000	10,600	4	5	5.58	7.95
Belle Ayr, WY/Amarillo, TX	December 14, 1972[b]	943	750	10,335	4	4	7.49	7.94
Belle Ayr, WY/Ft. Gibbon, OK	February 21, 1973	1,129	2,700	10,000	4	5	8.34	7.39
Average Rate/T-M								7.37
New Rates:								
Belle Ayr, WY/Amsterdam, MO	May 13, 1975	873	1,600	10,500	4	5	8.53	9.77
Belle Ayr, WY/Redfield, AR	January 28, 1976	1,631	3,000	10,500	4	5	12.78[c]	9.39
Cordero, WY/Smithers Lake, TX	July 26, 1976	1,607	4,000	10,500	4	4	15.60	9.71
Converse, CO/Gary, IN	July 12, 1977[a]	1,465	600	9,500	2.5	24	16.88	11.52
Cameo, CO-Acco, UT/Daniel, MS	February 3, 1978[a]	2,084	1,300	9,310	2	2	22.98[d]	11.03
Gallup, NM/Cochise, AZ	January 1, 1978[a]	523	1,000	9,000	4	2	8.64	16.52
Average Rate/T-M								11.33

[a] Effective date of initial tariff.
[b] Revised.
[c] Pre-escalated rate valid until June 30, 1979.
[d] Effective May 1, 1978.

APPENDIX C

Movements of coal in the West introduced into evidence and similar to complainant's proposed movement at January 1, 1978 rate levels

Line No.	Movement	Origin carrier	ICC tariff reference	Miles	Volume	Revenue per ton-mile (mills)
			Number			
1.	York Canyon, NM-Kaiser, CA	AT&SF	15329	1086	800,000	'7.79
2.	Dana, WY-Kansas City, MO	UP	5711	765	800,000	6.86
3.	Hanna, WY-Sergeant Bluff, IA	UP	5779	698	1,100,000	8.95
4.	Colstrip, MT-Cohassett, NM	BN	238	773	1,750,000	'7.10
5.	Belle Ayr, WY-Pueblo, CO	BN	178	595	1,670,000	7.65
6.	Belle Ayr, WY-Amarillo, TX	BN	304	942	750,000	7.95
7.	Compared movement average	xxx	xxx	809	1,145,000	7.72

'Carrier cars.

Rates on recently initiated coal movements similar to the San Antonio movement

Date movement commenced (1)	Origin/destination (2)	Miles (3)	Hours Load (4)	Hours Unload (5)	Tons per train (6)	Annual volume[1] (7)	January 1, 1976 Rate per ton (8)	January 1, 1976 Mills per ton-mile (9)
December 1976	Belle Ayr, WY-Welsh, TX	1,474	4	5	10,290	1,650	$10.65	7.23
June 1976	Belle Ayr, WY-Ft. Gibson, OK	1,147	4	5	10,000	2,700	8.34	7.27
May 1976	Belle Ayr, WY-Metropolis, IL	1,255	4	4	10,500	2,500	9.68	7.71
August 1977	Belle Ayr, WY-Jeffrey, KS	704	4	5	10,600	2,000	5.58	7.93
February 1978	Belle Ayr, WY-Council Bluffs, IA	661	4	4	10,000	2,000	5.23	7.91
	Average	1,048				2,170	7.90	7.61

[1]In thousands.

APPENDIX E

30951

INTERSTATE COMMERCE COMMISSION

No. 36180 OCT 31 1977

SAN ANTONIO, TEXAS ACTING BY AND THROUGH ITS CITY PUBLIC SERVICE BOARD v. BURLINGTON NORTHERN, INC., ET AL[1]

Decided October 13, 1976

Unit-train rates on coal from certain mines in Campbell County, Wyo., to San Antonio, Tex., prescribed.

C. Michael Loftus and *William L. Slover* for complainants.
Curtis H. Berg, Charles W. Burkett, Louis T. Duernick, Richard N. Gleason, and *Louis P. Warchot* for defendants.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

The modified procedure was followed. Due and timely execution of our functions under section 15(8) of the Interstate Commerce Act imperatively and unavoidably requires the omission of a recommended decision in this proceeding. Requested findings and evidentiary rulings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified or their resolution not necessary for the appropriate disposition of the proceeding.

By complaint filed May 6, 1975, San Antonio, Tex., Acting By And Through Its City Public Service Board, hereinafter referred to as complainant or the board, alleges that the rates and services which defendant railroads offer on complainant's prospective coal traffic are unjust, unreasonable, and unlawful in contravention of the national transportation policy and in violation of sections 1(4), 1(5), 1(6), 2, 3(1), and 6 of the Interstate Commerce Act. A prescription by the Commission of just and reasonable rates, charges, rules, and regulations for the subject coal traffic is requested. Complainant

[1]Defendants are Burlington Northern, Inc., (BN), Colorado and Southern Railway Company (C&S), Fort Worth and Denver Railway Company (FW&D), Chicago and Northwestern Transportation Company (C&NW), and Southern Pacific Transportation Company (SP).

filed an opening statement of facts and argument, to which defendants filed a reply statement of facts and argument, and this was answered by complainant's rebuttal statement of facts and argument. Both parties filed briefs.

Complainant is a municipal board which operates the gas and electric utility systems which are owned by the city of San Antonio. San Antonio is the third largest city in Texas and the fourteenth largest in the United States. The electric system with which the subject proceeding is involved sells 5.5 billion kilowatt hours of power annually to more than 270,000 separate homes, businesses, and industries in San Antonio and its nearby suburbs. Complainant states that because of certain circumstances it has had to increase charges to its customers to the extent that between 1972 and 1974, residential power costs more than doubled while industrial ratepayers experienced much greater increases.

The major cost of increased power costs is the increased cost of the boiler fuel which San Antonio uses in its steam electric generating plants. Up until 1972, San Antonio relied upon natural gas for its boiler fuel. However, in that year, the region's sole supplier of natural gas, with whom San Antonio had a long-term supply agreement, was unable to meet its contractural obligations to supply gas at 24 cents per m.c.f. because it lacked gas reserves commensurate with its sales commitments. In order to keep its system operating, San Antonio was forced to purchase gas from an alternate supply at nearly $2 per m.c.f. This cost increase was borne by its customers and was met by protests. Witnesses in support of complainant relate to the hardships caused by the increased rates and the variety of protest activities, including mass citizens' meetings, court suits, and ratepayer revolts that have taken place.

To bring the costs of electricity back within the means of the citizens of its community, complainant states that it is investing $250 million in a facility and program designed to generate electric power from coal. Bids were requested by the board from at least five different coal producers to determine the price and availability of coal. After evaluating the various bids and freight rate quotations from defendants, Sunedco Coal Company (Sunedco), with mines located in Campbell County near Gillette, Wyo., was selected as the supplier. Shipments from the Sundeco mines are to commence in early 1977. In the interim, shipments are to be made from mines of the Amax Coal Company (Amax), in Belle Ayr, Wyo., which is adjacent to Gillette, also located in Campbell County. The route involved will be BN from the origin point to Denver, Colo., C&S to

Texline, Tex., FW&D to Fort Worth, Tex., and SP to the generating plant in Elmendorf, Tex., a suburb of San Antonio, for a total distance of 1,644 miles.

The board estimates that when its new coal fired station in Elmendorf is fully operational it will require 3 million tons of coal annually. It contends that its decision to convert to coal and, specifically, to acquire long-term supplies of subbituminous coals from mines tributary to the lines of defendant BN was based upon defendants' proposal to furnish required coal transportation for $7.90 per ton in shipper's cars or $9.80 in carrier's cars. It charges further that in reliance upon the cited rate quotations, it made certain irrevocable commitments for a period of 20 years and that thereupon defendants on May 4, 1974, revised their quotation upwards from $7.90 to $11.09 per ton and withdrew the option to utilize carrier hopper cars. After repeated attempts to secure reinstatement of the $7.90 rate and its publication in tariff form, the board filed the subject complaint to secure a prescription of what it believes to be just and reasonable rates and regulations. Complainant now seeks the prescription of a rate of $9 per ton in shipper's cars in conventional unit-train service. The only available applicable rate at the present time is a class rate of $30 per ton.

Several witnesses in support of complainant gave evidence on the public interest in obtaining the lowest costs possible for electric power. They are concerned about the costs of transportation which appear to be the major factor in the cost of electricity. It was pointed out that the freight rate for moving the coal from the mines to San Antonio is more than twice the cost of coal ($5 as opposed to $11.09). Collectively they urge the Commission to prescribe rates and regulations which will enable the board to supply coal to the public at a reasonable cost.

Complainant introduced a number of rate comparisons to show that its requested rate is within the zone of reasonableness. The following table depicts selected data on several movements which are similar to the proposed movement in that each involves unit-train service; in shipper's cars; originates at a mine in the West; moves to a utility or utility-type receiver; is restricted as to allowable times for loading and unloading; requires a minimum shipment of approximately 10,000 tons at one time; and involves bituminous coal.

TABLE 1

Movements of coal at October 1, 1975, rate levels

Movement	Origin carrier	Miles	Volume	Revenue per-ton mile (in mills)	Revenue per-train mile
Dana, Wyo. to Kansas City, Mo	UP	765	800,000	4.89	$47.96
Hanna, Wyo. to Sergeant Bluff, Iowa	UP	698	1,100,000	5.60	43.22
Belle Ayr, Wyo. to Pueblo, Colo	BN	595	1,670,000	6.32	66.35
Belle Ayr, Wyo. to Amarillo, Tex	BN	942	750,000	6.54	70.68
Kulm Decker, Colstrip, Mont. to Superior, Wis	BN	875	2,000,000	6.08	63.84
Proposed San Antonio movement (at the rate of $9 per ton proposed by complainant).	BN	1,644	3,000,000	5.5	61.72
(at the rate of $11.09 per ton proposed by defendants May 1974).	BN	1,644	3,000,000	6.7	76.06

As shown above the simple average for the five listed movements is 5.89 mills per-ton mile and $58.41 per-train mile, as compared with the proposed movement producing 5.5 mills per-ton mile and $61.72 per-train mile at a rate of $9 per ton and 6.7 mills per-ton mile and $76.0o per-train mile at a rate of 11.09 per ton.

Complainant urgues further that while its movement is similar to the listed movements in an overall sense, it has certain characteristics which, from the standpoint of the carriers, are superior to those of any of the compared movements. San Antonio's movement of 1.644 miles and 3 million tons annually is roughly twice the average of the comparable movements and it is well recognized that the greater the volume and the longer the haul, the lower the per unit rate.

Although complainant has agreed to pay a rate of $9 per ton, it maintains that in the context of the existing rate structure for similar movements in the territory, the maximum reasonable rate for the proposed movement at levels prevailing in October 1975 would be $8.66 per ton in shipper supplied cars.

In addition to the rate comparisons above, complainant presented a cost study, which it later revised upon receipt of defendants' reply statement of facts and argument, to substantiate its claim that $9 would be a reasonable maximum rate. These studies produced extensive data on the traffic and operating characteristics of the contemplated movement with primary reliance on data secured from field surveys of comparable movements over a portion of the involved route for the accounts of electric utilities in Pueblo, Colo., and Amarillo, Tex. The data obtained through the field survey was used to adjust system average costs developed in Rail Form A, I.C.C. Statement 1F1-73, *Formula for Use in Determining Rail Freight Service Costs*. The variable costs as so developed came to $6.97 per ton, later revised to $7.73 per ton, at cost levels as of October 1975 in shipper supplied freight cars. The appendix attached hereto demonstrates how complainant arrived at its costs in its initial presentation, in its revised computation, defendants' Rail Form A costs (discussed later herein), and our conclusions as to the appropriate costs.

Evidence was also presented by the board to show that defendants were allowing other utility shippers of coal the option to use carrier equipment or to furnish their own cars which option is not open to complainant.

In addition to the contentions it makes with respect to the excessiveness of the rate per ton which defendants have proposed,

complainant points out that defendants would require the board to enter into an agreement for automatic annual escalation of the rate computed by a formula devised by the railroads prior to receiving any transportation service. Such a requirement, complainant argues, is an unlawful practice under section 1(6) of the act.

Complainant states that it is actively exploring transportation of coal by pipeline as an alternative to defendants' services. It admits that there is no pipeline service available to handle its coal, but claims that a major movement is underway to construct coal slurry pipeline systems in the West capable of meeting its requirements, as well as that of other shippers, and that it will avail itself of this service if it is unable to obtain a reasonable rate.

Complainant further alludes to a pact between C&NW and BN wherein C&NW has agreed not to compete for complainant's traffic. These two defendants plan the construction of a new line capable of originating San Antonio's coal. Complainant alleges that C&NW aggressively solicited its traffic in competition with BN until it entered their pact. Complainant desires the services of both carriers upon construction of the new line.

Defendants.—Defendants state that they are prepared to fulfill San Antonio's coal transportation requirements through publication of schedules offering the desired unit-train service as required by complainant. They admit furnishing complainant a proposed rate of $7.90 a ton by letter dated July 17, 1973, but that they also stated in that same letter that the proposed rate would be subject to an agreed to escalation formula with escalation to commence with July 1, 1974 and each July 1 thereafter. These rates were based on a unit train of 110 cars of 100-ton capacity which would be capable of delivering 11,000 tons in a trainload. Thereafter, on May 2, 1974, they notified complainant by letter that the prior quotation would be revised upwards to $11.09 a ton, subject to the same basic escalation formula as previously furnished with the first escalation to occur on July 1, 1975. The application of such escalation on July 1, 1975, provides a rate of $12.70 per net ton with subsequent escalation July 1, 1976. This is the rate defendants now propose in their pleadings filed in the subject proceeding.

It is BN's practice and policy to subject all annual volume rates to a basic escalation formula. The method of adjusting rates either up or down on July 1 of each year reflects cost of service changes and is mutually beneficial to the electric utility as well as the carriers. Utilities receiving coal by unit train have accepted annual changes in their freight rates based upon BN's escalation formula which

permits a more orderly forecast of their future fuel-cost charges permitting them to relate future electric generation and electric rate charges. The carriers benefit from agreed scheduled changes by permitting current cost levels to be recouped with no litigation or delay in recovering such costs. All of the escalation factors in the formula applied are public information and readily available. Basically, the formula increases the rates in amounts equal to increases in price indexes for the year prior as determined by the AAR. Defendants state that substantial acceptance by shippers or receivers of such escalation demonstrates that the plan is a reasonable means of rate adjustment.

Defendants allege that the quoted rate of $12.70 per net ton should not have taken complainant by surprise and is something they reasonably should have anticipated. To support this allegation they furnished two newspaper articles from San Antonio newspapers dated May 23, 1974, wherein complainant's general manager acknowledges a freight rate of $11 per ton, cost of coal at $5 per ton, for an overall price of $16 per ton. Thus, they argue that the board's claim of "bait and switch" tactics by the carriers is without foundation. The $11 rate was quoted prior to acceptance by complainant of Sunedco's bid, as well as the escalation proviso which was exercised on July 1, 1975, to bring the rate to $12.70 per net ton in shipper's cars.

Insofar as comparable rates are concerned, defendants note that there exist throughout the Nation a multitude of rate structures for the unit transportation of coal; that these structures carry rate levels which range between 5.24 miles per-ton mile and 8.29 mills per-ton mile; that no formula exists for their determination; and that, generally, unit-train rates cannot be compared. As to the unit-train rates maintained by defendant BN which compare unfavorably with the defendants' proposal for San Antonio, defendants claim that these are rates depressed by competition and are not suitable for comparison purposes. Moreover, defendants are renegotiating the rates to both Pueblo and Amarillo and plan to increase such rates shortly. In addition, defendants state that rates to Austin, Tex., on contemplated movements will be higher than that proposed herein.

Defendants charge that complainant's opinion of a reasonable rate is predicated on the erroneous assumption that the proposed movement will be handled with existing plant capacity. It will not. Defendants state that they are making substantial new investments in plant and equipment to accommodate this and other coal traffic. This investment they feel must be borne by coal, and the subject

movement must bear its portion of that added investment. For this reason they argue, any attempt to equate western coal movements with unit-train concepts elsewhere must be regarded as suspect.

Defendants assert that cost evidence submitted by them establishes the reasonableness, as well as the necessity, for a rate of $12.70 per ton. Although they submitted a cost study, (discussed and evaluated in the appendix attached hereto) mainly to offset complainant's study, they argue that costs are not the sole criteria of reasonableness of a rate. Costs, in their opinion, serve a useful purpose in aiding in the determination of minimum pricing and as a guide to defendants in establishing rates, but should be used as a reference point only and have no place in the establishment of maximum reasonable rates. Complainant's portrayal of defendants' variable or out-of-pocket costs is woefully deficient in that it fails to show all the incremental costs, as well as the true capital costs. On the other hand, defendants claim that they have presented a valid and economically sound calculation of the variable costs for the involved movement.

It is defendants' position that not only must the proposed rate satisfy the variable costs, it is equally important that the involved traffic contribute to defendants' overhead or fixed costs. They submit that the proposed rate of $12.70 per ton, taking into account their true demonstrated variable costs of $11.66 per ton, would only allow for a modest contribution of $1.04 per ton to their overhead costs.

In reply to complainant's charge that they do not have the option of using carrier's equipment, defendants state that the entire rate discussion between complainant and defendants was predicated upon complainant furnishing cars without an allowance. Moreover, complainant has already purchased equipment to be used in the contemplated movement which would demonstrate that they had no intention of utilizing railroad equipment. The use of shipper-owned equipment in unit-train service has become standard practice in the railroad industry.

On the question of coal slurry pipelines, defendants state that the cost to pipeline coal to San Antonio would require a rate of $29 per ton, or more than double the offered rail rate. Applying this figure, defendants conclude that the $16.30 between the cost of slurry pipelines and their proposed rate of $12.70 per ton demonstrates the reasonableness of their proposal.

Addressing the public interest issue raised by complainant, defendants assert that the cost to the average consumer of

electricity generated with coal at $12.70 per ton will be $0.95 cheaper per KWH than power generated from gas or oil. Stated in another way, rail transportation will reduce the average customer's electric bill by almost $3.26 per month. This fact, defendants argue, demonstrates that their proposed rate rather than causing hardship for the citizens of San Antonio, will aid them and therefore, any allegations of hardship from their rate are unfounded. Defendants also make reference to the board's ability to pass on increases in fuel costs to its customers as relevant with respect to the parties' comparative abilities to deal with increased costs.

The allusions made by complainant that there is some agreement between BN and C&NW not to compete for traffic from the Sundeco origin mine is not accurate, according to defendants. They refer to *Burlington Northern, Inc.—Construction and Oper.*, 348 I.C.C. 388, wherein the Commission allowed construction of trackage by both carriers to newly developed coal fields in Campbell County. However, the trackage leading to both the Sundeco and Amax coal mines was awarded solely to BN. Thus, the C&NW could not originate traffic at either of these mines and could not supply the required service. It was for this reason that the C&NW no longer actively pursued the traffic of complainant.

Discussion and Conclusions

There is no dispute that the presently effective class rate of $30 per ton is unjust and unlawful when applied to complainant's unit-train traffic. Nor is there any resistance on the part of defendants to offering complainant transportation in unit-train service at a rate which it believes to be more applicable to the service requested. Thus, it has been demonstrated that the existing rate on the traffic in question is unlawful. This showing is a necessary predicate to a prescription by us of a reasonable rate under section 15(1) of the act.

Under section 15(1) of the act the Commission is empowered, among other things, to determine and prescribe what will be the just and reasonable individual or joint rate to be charged. In *Ayshire Collieries Corp.* v. *United States*, 335 U.S. 573, 582, the Court in considering our authority to deal with proposed rates stated:

> It seems too plain for argument that such broad authority is ample for the modification of either proposed or existing rates or both. The power granted the Commission under section 15(1) to deal with rate schedules already effective supports that view. For once the Commission finds the rate to be unjust and unreasonable or justly discriminatory or unduly preferential or prejudicial or otherwise unlawful, the

Commission is granted the power under section 15(1) to determine and prescribe the just and reasonable rate. The Commission is not bound either to approve or disapprove *in toto* the new rates that are proposed. It can modify the proposal in any respect and require that the proposed rates as modified or wholly different rates be substituted for the present ones. That has been the view of the Commission since the beginning; and we think it is the correct one. [Footnotes omitted.]

In prescribing maximum reasonable rates under section 15(1), the Commission traditionally has looked to certain established criteria which provide a basis for determination of a maximum reasonable rate or change of rates. Complainant on brief states that the applicable criteria are: (1) comparison of the rate under consideration with established rates for comparable shipments in the territory involved; (2) the relationship between the rate and the cost of providing the service; and (3) the economic effects of the particular rate on communities. We agree with the criteria set out above, but in addition we are charged under the national transportation policy to recognize and preserve the inherent advantages of all modes of transportation. This means that we are not to prescribe rates that will be confiscatory and add to the burdens faced by rail carriers in recent years. Nor should we prescribe rates which are based only on variable costs. We agree with defendants that rates on a particular commodity should cover not only variable costs but also should yield enough above such costs to cover the carriers' constant costs of performing the service. See *Investigation of Railroad Frt. Rate Structure—Coal*, 345 I.C.C. 493, 504. Accordingly, as will be hereinafter discussed, we have developed fully allocated costs to assist us in prescribing a just and reasonable rate for the proposed movement.

In applying the first criteria enumerated by complainant, we recognize that unit-train movements must be compared with rates for similar movements. In this instance, numerous rate comparisons are of record. Two of these comparisons are particularly apt in that they involve the same origin point as the subject movement, Belle Ayr, Wyo., but vary in the length of haul. All three move in unit trains of at least 100 shipper-owned cars, carrying approximately 100 tons per car.

Destination	Route	Rate per ton as of January 1, 1976	Miles	Annual volume
Pueblo, Colo	BN-C&S	$3.76	595	1,670,000
Amarillo, Tex	BN-C&S-FW&D	6.16	942	750,000
San Antonio, Tex	BN-C&S-FW&D-SP	12.70	1,644	3,000,000

While complainant's proposed movement, in the overall sense, is similar to the two compared movements, there are significant differences. The length of haul and the annual volume makes it more attractive from a revenue standpoint to the carrier and should be accorded recognition at the rate level. We must, therefore, conclude that the rate proposed by defendants, on a comparative level, is excessive. It must also be recognized, however, that the involvement of an additional carrier reduces the revenue to be retained by the BN system.

Defendants attempt to explain away the disparity in rates between the above movements by stating that the rates to Pueblo and Amarillo are depressed because of competition from Colorado and New Mexico coal mines. Defendants further state that when the Commission recognizes the cost adjustments to Rail Form A utilized in the subject proceeding, they anticipate making related adjustments to the existing Pueblo and Amarillo movements and seek renegotiation of the rates to these two points. These statements, without supporting detail, do not justify the disparity which has been shown. Moreover, as discussed in the appendix, we have not accepted many of defendants' proposed adjustments.

Turning now to the relationship between the proposed rate and the cost of providing the service, we find this as the most convincing reason to find defendants' proposed rate unjust and unreasonable. Our restatement of complainant's costs, which appear to be the best costs of record for reasons noted in the appendix, shows that defendants' erroneous adjustments contribute an additional $3.63 per ton in variable costs ($11.66 as opposed to $8.03). This results mainly from additives for locomotive and caboose capital costs, for plant capacity expansion and for additional maintenance-of-way costs. Defendants compute a capital cost factor of 15.5 percent for locomotives which are to be purchased at some future time. We do not question the need to acquire additional locomotives and cabooses as a result of the proposed transportation, but we are unable to accept a capital cost factor of 15.5 percent when recent equipment trust certificates are based on 8.5 percent and the current rate for outstanding equipment obligations is only 6.37 percent.

In addition, defendants' inclusion of the entire amount of $117.16 per carload for plant capacity expansion is improper. A large portion of this expense for plant expansion is not even predicted to be expended until 1980. Also, even if these expenses were incurred solely as a result of the subject traffic, it is obvious that the other

traffic handled over the lines, as well as any future traffic which may come on line, will reap the benefits of this plant expansion. For example, defendants contemplate future movements from Wyoming mines to Austin and Corpus Christi, Tex. As a result, it would be unfair to single out only the subject traffic as being responsible for expenditure of these funds.

As to the economic effect on the communities involved, defendants argue that the board's consumers will reap the benefits of defendants' proposed service and the proposed rate in that the average electric bill will be $3.26 less per month than if gas or oil had been used. We fail to see how this analogy would lead us to a conclusion that defendants' proposed rate is just and reasonable. In addition, the theory advanced by defendants in defense of their escalation clause that the board, unlike the defendants, is at liberty to pass on to their customers any increase in costs without the necessity of obtaining specific approval from any regulatory agency does not help us to endorse defendants' proposal. We have more regard for the public interest than such a proposition will allow. In *Southern Class Rate Investigation*, 100 I.C.C. 513, 605, we stated that protection of the public interest was one of the main reasons for the creation of the Commission.

We have often stated that under the act carriers are free in the first instance to publish rates which in their managerial discretion seem warranted. We have also stated that so long as such voluntary established rates are reasonable or otherwise lawful, we would not interfere with the carrier's managerial prerogatives. However, in the instant proceeding the evidence discloses that the level of the rate proposed by defendants is unreasonable since defendants would have complainant pay for equipment and improvements that are not required solely as a result of complainant's traffic or that may or may not be acquired at sometime in the future. On the other hand, complainant's traffic will be responsible for some of this additional expense. Under the circumstances presented, the $9 rate it proposes will not make a sufficient contribution to fixed costs.

As further discussed in the appendix, we believe that a rate of $10.16 per ton, is reasonable and should be prescribed. As the evidence demonstrates, there is no suggestion that defendants will incur losses from the traffic in question at that level. The $10.16 rate, which approximates the full cost level, covers our restated variable costs of $8.03 per ton and provides a contribution of $2.13 towards fixed costs. This amount is greater than that sought by defendants in their proposed rate of $12.70 per ton which included

only $1.04 towards overhead or fixed costs (variable cost of $11.66-$12.70). When taking into account the volume of traffic to be carried, over $6 million annually will be realized by defendants.

We are also unable to approve the requirement by defendant that complainant agree to an escalation clause. The fact that BN has had such an agreement for the past 4 or 5 years with other electric generating utilities does not make such a practice mandatory.

Complainant's charge that the unwillingness of defendants to either provide complainant with freight cars or pay an allowance for the furnishing of freight cars is a violation of sections 1(1) and 3(1) is without merit. The cost of equipment was not considered in the rate quoted. In unit-train rates the shipper usually furnishes the cars which are generally of a larger capacity (100 tons) than standard coal cars, thus permitting more efficient and economical operations. See *Increased Freight Rate and Charges, 1972*, 341 I.C.C. 290.

We also find no merit to complainant's charge that defendant's proposed rate would violate sections 2 and 3(1) of the act. In order to support a section 2 violation, it must be shown that another receiver at the same destination point is being accorded a different rate from the same origin. Similarly, complainant does not establish any violation of section 3(1). It is well established that a mere difference in rates standing alone does not demonstrate unlawfulness under that section and that general declarations as to competition or injury unsupported by evidentiary facts, as in the subject proceeding, will not support a finding of undue preference and prejudice, see *Koppers Co., Inc.*, v. *Chesapeake & O. Ry. Co.*, 303 I.C.C. 383, 391.

We conclude that a rate not greater than $10.16 per ton in shipper's cars from the mines in Campbell County, Wyo., to San Antonio, Tex., would be just and reasonable as of October 1, 1975. Since this rate is not subject to the customary escalation clause associated with coal annual volume rates, provision must be made for cost increases which have occurred since October 1, 1975. In our view, this can be accomplished by increasing the rate by the amount of rail general rate increases implemented in this territory between October 1, 1975 and the date of our order herein. Updated to take into account the second stage of the Ex Parte No. 313 increase and the Ex Parte No. 330 increase, the present just and reasonable rate is $10.93.

The public interest requires that, in view of the parties' inability to reach an agreement, a rate be prescribed at this time so that the movement may commence. As actual experience is gained, the

parties may petition for modification of the prescription if circumstances warrant.

Although complainant also requested the prescription of rules and regulations for the subject coal traffic, we do not see the necessity for prescribing specific rules in view of the fact that a unit-train coal tariff incorporating the agreed upon tonnage requirement and furnishing of equipment, referred to on this record, has now been filed with the Commission. These rules appear appropriate for use in connection with the prescribed rate, and should be used by the parties absent agreement with regard to substitute tariff provisions.

We find that the presently effective class rates which defendants maintain on bituminous coal traffic moving from mines in Campbell County, Wyo., to Elmendorf, Tex., are unreasonable as they apply to complainant's proposed coal traffic and are unlawful in violation of section 1(5) of the Interstate Commerce Act.

Considering the evidence of record, including rate comparisons and cost evidence, in light of the criteria previously discussed, we further find that in the exercise of our authority under section 15(1) of the act that we require defendants to offer complainant unit-train service from mines located in Campbell County, Wyo., to Elmendorf, Tex., at a rate not greater than $10.93 per ton herein found to be just and reasonable.

And we further find, that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, That defendants be, and they are hereby, notified and required to establish on or before 5 days from the date of service of this report and order upon not less than 1 day's notice to the Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act and thereafter maintain and apply lawful rates on bituminous coal from mines located in Campbell County, Wyo., to Elmendorf, Tex., in accordance with the findings herein; and that this order shall continue in full force and effect until the further order of the Commission.

By the Commission. (Commissioner MacFarland did not participate.)

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX

Cost evidence

Complainant's costs.—Complainant states that at present there are unit-coal trains operating between the Belle Ayr Mine of Amax Coal Company and the Colorado Public Service's Commanche Station at Pueblo, Colo. This unit-train operation closely resembles the unit-coal-train operation proposed for the movement to San Antonio. In fact, the San Antonio train will utilize the same trackage as far as Pueblo. In order to develop traffic, operating and cost evidence, complainant's cost witness made a field survey of the operation of the Pueblo unit-coal train during the week of October 6, 1975. In addition, the proposed San Antonio unit-coal-train operation was discussed with railroad personnel. The following is a summary of traffic and operating characteristics used in developing costs for the proposed movements:

1. Annual volume----------million tons	3
2. Loading and unloading time----------hours	8
3. Tons per train	11,407

Power-diesel units

4. Between: Origin and Denver	5
5. Denver and Fort Worth	7
6. Fort Worth and San Antonio	6

Cars

7. Number	110
8. Tare weight----------tons	28.8
9. Average loading----------tons	103.7

Mileage

10. BN	1,277
11. SP	357
12. Total	1,634
13. Crew districts in loaded direction	16
14. Crew districts in empty direction	16
15. Helper service at Crawford, Nebr	Yes
16. Yard Service at Denver	Yes

The detailed traffic and operating characteristics of the proposed unit-train movement were used to adjust system average costs developed in Rail Form A (I.C.C. Statement 1F1-73, *Formula For Use in Determining Rail Freight Service Costs*). Annual reports to the Commission for the calendar year 1974 were used to develop separate Rail Form A's for the BN and SP.

Complainant notes that fixed or constant costs do not vary with fluctuations in traffic volume, but are occasioned by the operation as a whole. Fully allocated costs include the variable costs plus an allowance of constant costs to particular segments

of traffic. However, any allocation of constant costs, which by their very nature are unallocable to segments of traffic, must necessarily be arbitrary. The amount by which a rate exceeds variable costs is a function of economic factors other than costs. Therefore, the costing procedures, used by complainant herein, develop the cost of moving the subject traffic on the variable level of costs.

In the developing of costs for the subject movement, crew wages expense was computed separately, rather than using Rail Form A averages. Complainant's crew wage item reflects as of October 1, 1975, basic daily and mileage rates, vacations, holidays, constructive allowance, and transportation departmental and general overheads.

Diesel unit costs were developed using Rail Form A procedures adjusted to reflect number of locomotives and train miles run by crew district, doubling of train between the Belle Ayr Mine and Rozet, Wyo., a helper service between Crawford and Bellmont, Nebr., and slave units between Denver and Fort Worth. Costs related to cars were excluded since the cars will be furnished by complainant. Gross-ton miles (developed using Rail Form A procedures) were applied to the round trip gross-ton-miles over the roads of each carrier. Round trip gross-ton-miles reflect the gross tons of cars and contents in the loaded direction, gross tare tons of cars in the empty direction, total train miles, and number of cars in the train. Rail Form A train supplies and expenses related to the distance have been included. However, train supplies and expenses, unrelated to distance, do not apply to unit-coal train movements and have been excluded from complainant's cost study. Other train-mile expenses (dispatching trains, a portion of train supplies and expenses, signals and interlockers, crossing protection, et cetera) were also included in the railroads' costs based on Rail Form A procedures.

Terminal costs included in complainant's study consist of station billing costs and yard switching at Denver. For station billing, complainant included an arbitrary amount of $1.25 per carload, which complainant contends would compensate the railroads for the simplistic billing procedures involved in handling the subject traffic. Since origin and destination switching are handled by road crews, terminal yard switching expenses are not applicable to the subject movement, with the exception of yard switching of slave power at Denver.

Complainant indexed its 1974 costs to the 1975 level using procedures detailed in I.C.C. Statement No. 2-58, *Rail Carload Cost Scales by Territories as of January 1, 1958*. The following indexes were developed:

BN	1.119
SP	1.126

Based on the various procedures outlined above, complainant developed costs, as summarized below, for movement of the proposed unit-coal train from Campbell County, Wyo., to its power station:

Functional area	Variable costs	
	1974	1975
1. Gross-ton-mile cost per carload	$359.89	$403.27
2. Diesel cost per carload	154.53	173.22
3. Crew cost per carload	88.98	101.73

Functional area	Variable costs	
	1974	1975
4. All other	$40.19	$44.86
5. Total cost per carload	643.59	723.08
6. Total cost per ton	6.21	6.97

Defendants' costs.—Defendants' position is that to handle the subject traffic a rate of $12.70 per ton, with escalation on July 1, 1976, and each July thereafter is within the zone of reasonableness. They argue that rates generally are not related to variable costs. Variable costs only provide a floor below which rates should not go, but once having performed this function, variable costs have no further relevance to ratemaking. They also note that fully allocated costs are deficient and misleading. Fully allocated costs can neither be directly related to cost consequences of addition or subtraction of any traffic movement, nor be directly related to the costs incurred by moving present and future traffic. It is defendants' contention that no cost formula can provide an appropriate basis for establishment of maximum rates. Nonetheless, in response to complainant's cost study, defendants have developed their own study of the costs of handling the subject traffic.

Defendants' cost study is based on a Rail Form A application to the 1974 composite data of the BN, C&NW, FW&D, and SP. The results were indexed to the July 1, 1975 cost level, except for wages which reflect the October 1, 1975 cost level, which is the same point in time used by complainant.

The railroads also prepared for comparative purposes a cost study using Region VI (Mountain Pacific and Transterritory) unit costs for 1974. The same operating characteristics and indexing procedures employed in defendants' cost study were employed in its regional cost study. A summary of the operating characteristics used in defendants' studies follows:

1. Tare weight----------tons	31
2. Cars per train	110
3. Net load per car----------tons	101
4. One-way mileage----------miles	1,644
5. Diesel units per train	9.57
6. Locomotive units between:	
Mine and Denver	5
Denver and Amarillo, Tex	8
Amarillo and Fort Worth	6
Fort Worth and destination	7
7. A train set will operate 50 weeks per year and complete 44.8 round trips per year.	
8. Yard switch engine time per round trip----------hours	19.37
9. Helper service at Crawford, Nebr. per-loaded train----------hours	2

Defendants also claim that transportation of the subject traffic will require the purchase of 67 new locomotives and 9 new cabooses, as well as increased plant capacity, i.e., replacement of rail, ballasting and surfacing; improved sidings;

lengthening of sidings; additional sidings, improved signalling and communication; all of which the existing traffic does not require. Heavy unit-train movements require additional maintenance-of-way expenditures over that required for nonunit-train traffic.

The following is a comparison of the results of complainant's cost study with defendants' cost study and with defendants' regional cost study.

Variable cost per car	Complainant's costs[1]	Region costs[2]	Defendants' costs[3]
1. As measured by Rail Form A excluding locomotive and caboose capital costs	$674.54	$768.53	$867.78
2. Additional maintenance-of-way costs	xx	xx	23.23
Incremental cost for[4]			
3. Locomotive diesel units	48.33	51.29	166.94
4. Cabooses	0.24	0.27	1.62
5. Plant capacity expansion	xx	xx	117.16
6. Total variable cost	723.11	820.09	1,176.73
7. Tons per car	103.70	101.00	101.00
8. Cost per ton	6.97	8.12	11.66
9. Federal income tax at 48 percent	xx	xx	.37
10. Variable cost per ton at 48 percent Federal income tax	xx	xx	12.23

[1]Includes cost of capital at 5.2 percent, based on embedded cost, and is before Federal income tax.

[2]Includes cost of capital at 4.99 percent, based on embedded interest cost, and is before Federal income tax.

[3]Includes cost of capital at 14.8 percent before Federal income tax. Federal income tax incremental rate is 24 percent.

[4]Includes cost of capital at the current rate of 15.5 percent before Federal income tax. Federal income tax incremental rate is 24 percent.

Defendants' cost of $1,176.73 per car is $356.64 higher than the region costs. Of the latter amount, $99.25 represents proper cost of capital, exclusive of locomotive and caboose capital cost. The amount of $23.23 is attributed to additional maintenance-of-way expense incurred by heavy unit trains. An amount of $117 represents incremental locomotive diesel units and caboose investment cost and the associated cost of capital. Finally, $117.16 represents plant capacity expansion to handle coal traffic on the route of movement of the involved traffic. Defendants' calculations include: (1) the embedded cost of capital in determining the Rail Form A unit costs applied to the movements and their operating characteristics, (2) additional maintenance expense attributable to unit trains, and (3) the capital investment and attendant current cost of capital of (a) locomotive units and cabooses required for this traffic and (b) the plant capacity expansion occasioned by this new traffic.

Defendants contend that the variable cost level determined by complainant is inappropriate for three basic reasons: (1) failure to recognize the requirement for incremental new capital investment; (2) understatement of the proper cost of capital; and (3) failure to account for the total operating characteristics of the involved traffic.

The subject traffic, argues defendants, cannot be added without any change in the investment and cost base. Therefore, complainant's omission of the cost for added capacity and substantial new investment, including a proper cost of capital, is a fatal omission in the determination of a proper price or rate. The route of movement will require expansion of track and related items by BN in the amount of $112 million. Of this amount, $75 million is new investment and the remainder consists of operating expenses. The involved coal movement will require new investment for diesel units and cabooses in the amount of $490,000 and $43,000 per unit, respectively. SP also must make new investment to expand planned capacity in the amount of approximately $3 million.

Defendants further contend that complainant's computation of historical capital costs when a service is clearly incurring new capital costs is fallacious. Complainant's analysis, which relies on Rail Form A procedures without adjusting to recognize the incremental costs of new capital commitments and the appropriate cost of capital applicable to both new and existing capital employed, is in conflict with basic economic principles.

In addition to the above, defendants claim that complainant's study is deficient for the following reasons:

(1) Understatement of crew costs in that constructive allowances for deadheading crews in the operation of unit-coal trains may be higher than average and by labor contract agreement there is a requirement that on some runs locomotive engineer trainees must be working.

(2) Improper omission of running car repairs and servicing costs which are borne by the carrier.

(3) Arbitrary determination of station clerical costs, rather than the formula basis of adjusting for multiple car billing.

(4) Exclusion of switching expense except at Denver since switching service will also occur at Alliance, Nebr., Amarillo, Fort Worth, and San Antonio.

(5) Exclusion of claim cost and expense.

(6) Understatement of helper service at Crawford by use of 1.5 hours of time, since the projected time spent per train is 2 hours, which includes an allocation of nonproductive time.

(7) Inconsistency of complainant's index development with its application since in the development of index crew wages and freight car depreciation and interest were included, while these items were excluded from the costs to which the index was applied.

(8) No recognition of new investment requirements.

(9) Failure to determine and use in the Rail Form A cost formula the embedded cost of capital applicable to the embedded investment and a current cost of capital to the new investment requirements.

Complainant's rebuttal cost evidence.—Upon receipt of defendants reply statement, complainant filed a rebuttal statement wherein it criticized defendants' presentation and, in addition, revised its cost study.

Complainant contends that defendants portrayal of variable transportation costs is totally out of touch with the transportation actualities and tend to overstate grossly the true cost of the proposed unit-coal train service between the two involved points. It claims that the major portion of defendants' overstatement of costs results from four additives to the costs: (1) $1.16 per ton addition to variable costs to cover

amortization and return on some future unexpended capital investments and operating expenses which defendants say they will make; (2) $0.81 per-ton increase in variable costs to provide defendants with what is described as an "embedded fair rate of return" on their historical investment; (3) $0.23 per ton additive to compensate for extra maintenance-of-way allegedly occasioned solely by complainant's unit-train traffic; and (4) an additive of $1.15 per ton which is a combination of additives (1) and (2) as applied to locomotive requirements.

However, based on information contained in defendants' statement, complainant concedes it may have made certain errors in computing railroad costs and revised its study accordingly. Shown below are total variable costs per ton in all three studies presented:

	Variable costs per ton		
	Defendants	Complainant	
		Original	Revised
Total per ton	$11.651	$6.972	$7.728

In its revisions of its cost study, complainant used a tare weight of 30 tons per car. This reflects the midpoint of the weights of the actual cars which have been constructed for use in this service. The original cost study reflected a tare weight of 28.8 tons. Defendants used a tare weight of 31 tons which complainant states was not supported by workpapers. It then reduced average loading from 103.7 tons to 102.5 tons to reflect the capacity of the subject cars. One-way route-of-movement miles were increased from 1,634 to 1,644 miles, which is the same figure used by defendants. Diesel unit-miles reflect the route-of-movement miles as well as the number of diesel units involved in each segment of the move. Thus, complainant revised its diesel unit-miles upwards to 20,519.0, as opposed to defendants' use of 21,450.6. Gross-ton-miles were also revised to 267,150 by complainant as opposed to 267,972 by defendants.

Complainant states that the switching factors developed by defendants are not supported by any studies and are merely estimates. While complainant was not able to observe every switching operation between origin and San Antonio, it did observe a large portion of these operations. Based on actual observation at Denver, complainant developed that switching would require 2.3 hours per round trip, including allowances for nonproductive time and other factors. Defendants used 3.5 hours. At Amarillo there is no yard-to-yard movement, as claimed by defendants. The switching of one locomotive in the loaded direction and the switching in of one locomotive in the empty direction are the only requirements. Complainant allowed one-half of the time observed at Denver for the switching at Amarillo (1.15 hours). A similar operation will occur at Fort Worth, and complainant likewise allowed 1.15 hours there. At San Antonio, complainant allowed 0.58 hours for placement of slave units at the head end of the train for the empty movement. This is not required in the loaded direction. At Alliance, complainant used the 1 hour switching time developed by defendants. Defendants used a total of 2.37 hours for switching bad order cars, which also was an unsupported estimate. Complainant is to provide a shop and inspection station at the power station and will thoroughly inspect each train after unloading. Since bad order time will be reduced, complainant used one-half of the amount used by defendants.

Complainant's development of costs reflects application of BN unit costs to the service units of the subject traffic, while moving over the BN and family lines. SP service unit costs were applied to the service units generated by SP. Defendants applied composite costs of the involved railroads to all service units generated by the subject traffic. This results in a disproportionate application of the costs to the service units as can be seen below:

	BN	SP	Total
One-way miles	1,277	367	1,644
Percent of total	78	22	100
Operating expenses (000)	$1,085,718	$1,022,588	$2,108,306
Percent of total	51	49	100

While SP mileage is only 22 percent of the total, its portion of total expenses is 49 percent. Since the unit costs of the carriers vary significantly, defendants' method of cost development produces distorted results.

Defendants overstated the gross-ton-mile costs (defendants—$501.76; complainant's revision—$416.72) because of their use of a 14.8 percent return on road properties and of their composite unit costs. Defendants' substitution of a 14.8 percent rate of return for the Rail Form A system average rate of return of 5.2 percent results in an overstatement of $79 per carload. Use of the composite unit costs results in an overstatement of $6 per carload.

Defendants' locomotive costs other than capital are also overstated, according to complainant, because of the use of composite railroad unit costs and because of an overstatement of the round trip diesel unit-miles. Their unsupported use of 8 diesel units between Denver and Amarillo results in an overstatement of 932 round trip diesel unit-miles. In October 1975, complainant observed the Pueblo unit train (consisting of 14,573 gross tons) between Denver and Pueblo. The power pulling this train consisted of seven 3,000 h.p. units. As the ruling grade between Denver and Amarillo is in the Denver to Pueblo segment, complainant assumed this power to run through to Amarillo.

In its revised cost data complainant has accepted defendants' additives to crew wage costs for firemen, construction allowances, local crew wages, and weight on drivers. This results in a total crew wage cost per carload of $109.71, compared with $118.01 computed by defendants. Complainant did not accept defendants' additives for deadheading the Sterling to Brush, Colo., crew, and the Fort Worth to Ennis, Tex., crew. Based on discussions with railroad operating personnel complainant determined that these crews operate in a turn-around service. Therefore, only half of the crew wages in each direction are assignable to the subject traffic. Complainant also did not accept defendants' composite general and transportation departmental overheads. It developed these overheads separately for the BN and SP and applied them to their respective portion of the movement.

As to train-mile—other costs, complainant included an allowance for nonrevenue traffic which was inadvertently excluded in its original costs. Caboose capital costs were excluded from this item, but included separately in its study. Defendants' cost for this item differs only slightly from complainant's revised cost.

Complainant included in its revision an allowance for car inspection, which was inadvertently omitted from its original costs. It also adjusted train supplies and

expenses to reflect the revised round trip car-miles. Switching costs per carload were adjusted to reflect the revision of switching times discussed above. Defendants' switch engine minutes applied to their composite unit cost has the effect of overstating the costs by approximately $11 per carload.

Carload claims, clerical cost, and loss and damage cost, which were omitted from complainant's original costs, were included in its revised costs. Complainant did not adjust the $1.25 per car allowance for station clerical costs and maintains this amount will more than compensate the railroads for all such costs incurred. It contends that the railroads' development of this cost, wherein it is assumed that one-half the system average cost is related to the car and one-half is related to the shipment, produces an excessive cost for this item as far as the subject traffic is concerned.

In its revision of locomotive diesel unit capital cost, complainant assumed that as a result of the subject movement, defendants would purchase 50 new locomotives at $490,000 per unit with an average life of 20 years. Based on recent equipment trust certificates, return was computed at 8.5 percent. A total locomotive capital cost of $51.68 per carload was computed. Defendants cost of $166.94 was based on the assumption that 67 units would be purchased at $490,000 each, with an average life of 20 years; return was computed at 15.5 percent. Complainant contends that defendants' approach produces gross distortions and overstatements.

Complainant believes that defendants assume that specific pieces of equipment will be solely operated as part of the proposed San Antonio unit-coal train. Normally, a power dispatcher on a particular section of railroad has available a fleet or pool of locomotives which are assigned to various train movements as circumstances require. The San Antonio trains will operate in an area of the BN now traversed by growing numbers of coal movements. All of these coal movements can and will use the same type of heavy-duty diesel-electric locomotive which will power the San Antonio trains.

Defendants have also allegedly overstated the numer of units, including spares, assumed to be assigned. At Fort Worth it is assumed that one BN unit will be dropped off and two SP units will be added in the southbound direction and the reverse will occur in the northbound direction. However, with the introduction of run-through operations, it is not necessary to drop off the BN unit and, thus, it would be necessary to add only one SP unit. Defendants also assume that eight (plus one for spare) units are required for the entire train. Actually, only five are required for the entire movement; seven between Denver and Amarillo; six between Amarillo and Fort Worth; and seven between Fort Worth and San Antonio. (The extra two units between Denver and Amarillo are required only in the southbound direction.) Also defendants' assumption that eight units are required between Denver and Amarillo is allegedly inflated. Complainant observed a similar unit train operating between Belle Ayr, Wyo., and Pueblo, powered by seven units. (The steepest grades on the Denver to Amarillo segment occur within the Denver to Pueblo area.) Thus, not only is defendants' assumption that eight units are required for the entire trip erroneous, but also the eight-unit maximum is excessive, i.e., seven units would be the maximum required. There is also no basis for the 15-percent spare margin allowances. Based on an analyses of BN, C&S, and FW&D, total and active locomotives for 1973 and 1974, the percentage of unserviceable and stored locomotives to total active locomotives is approximately 7.5 to 7.6 percent—approximately half of the 15-percent figure used by defendants. In addition, defendants assumed that seven train sets would be required to transport the annual movement of 3 million tons. However, seven train sets would move substantially more tonnage than required (3,543,736 tons), whereas six train sets can deliver an annual volume of 3,037,488 tons. Defendants further inflate the costs

through use of a capital cost factor of 15.5 percent, whereas equipment trusts currently bear an interest rate of approximately 8.5 percent.

Complainant revised its caboose capital costs by assuming the defendants would purchase six new cabooses at $43,000 each with an average life of 20 years; return was computed at 8.5 percent. A cost per carload of $0.21 was computed. Defendants computed cost of $1.62 per carload was based on the purchase of nine cabooses at $43,000 each, 20-year life, and return at 15.5 percent.

Also, in its revision of variable costs, complainant accepted defendants' index of 15.43 percent to increase base year 1974 costs to July 1975.

Neither in its revised costs nor in the original costs did complainant include any allowance for additional maintenance-of-way or present capacity expansion. Defendants did add such an allowance to its costs.

Complainant states the roadway maintenance costs included in its study, based on system averages, reflect tare weight of equipment, net loading and 100 percent empty return. In addition, these system average costs reflect lines where maintenance levels reflect train speeds ranging from in excess of 60 mph to train speeds of less than 30-40 mph, trackage in mountainous territory with a high degree of curvature and steep grade conditions as well as trackage over relatively level plains with a minimum of curvature and steep grade, heavy through trains where the relationship of the weight of the power is small in comparison to the trailing weight, light local trains where the relationship of the weight of the power is high in comparison to the trailing weight, and commodities ranging from in excess of 100 tons per car to less than 20 tons per car. The major flaw in defendants' treatment of this item is that in addition to use of the composite system average unit costs, they have singled out the weight of the cars in computing costs and, therefore, created an additive to the system average expense. If the segment of line to be utilized by the subject traffic is treated separately, then all factors therein should be considered and the system average costs should be excluded. Defendants computed maintenance-of-way costs for nonunit train traffic of $200 per million gross tons (MGT) and for unit-train coal traffic of $275 per MGT. The difference ($75 per MGT) was applied to the annual gross tons and the result was added to the system average experience. However, complainant abstracted the BN system average variable costs related to rail, ties, ballast, et cetera, from the BN 1974 Rail Form A, indexed to July 1975 cost levels. The results show that the BN system average cost per MGT is $390. Thus, the system average amount exceeds the amount computed by defendants as applicable to unit-coal trains.

In its treatment of roadway maintenance and roadway capital unit costs, complainant employed standard Rail Form A factors. BN and SP system factors reflect both railroads' operations in relatively level territory East of the Rocky Mountains, as well as in mountainous territory. Systemwide data includes maintenance of high-speed main lines, as well as branch lines, which are characterized by slow speed operations and lighter traffic.

Defendants included Rail Form A capital costs adjusted to reflect a return of 14.8 percent on each railroads' investment in equipment and roadway properties. Also included were Rail Form A system-average roadway maintenance costs. In addition, defendants calculated return at 15.5 percent on the claimed investment for new plant expansion for the BN and SP. Defendants have computed an alleged investment of $116 million to rehabilitate the line of railroad between the origin mine and San Antonio. However, they are including in the investment base for purposes of establishing a rate in 1976 expenditures that will not be made until 1980. Only 17 percent of the alleged investment will be accomplished in 1976; another 66 percent

will not occur until the period 1978-1980. Complainant states that there was little or no support in the form of workpapers or source data for the development of the $116 million figure. Also noted is that this amount is amortized over a 20-year period when the life of the property is considerably longer. The same dollars which the defendants have included in their annual capital costs will appear again as depreciation and in their operating expenses in the years in which such expenditures are recorded. Complainant further notes that defendants' approach considers the conditions of each shipper's traffic in a vacuum. Existing traffic, although enjoying the benefits of the improved plant under the BN approach, will not share in the rehabilitation cost. Moreover, shippers coming on line in the future would benefit from the improvements, but would not share in the cost of the investment. Complainant states that use of system investment and operating expenses in the standard Rail Form A approach reflects costs associated with large portions of the BN's and SP's transportation plant not related to the subject traffic. When the incremental approach followed by defendants is used, then all other portions of the rail plant not used by the San Antonio traffic should be excluded.

Complainant concludes that defendants' requested rate of $11.09 (now $12.70) per ton is inappropriate and that a reasonable rate level on the subject movement would be in the range of $9 per ton.

Cost conclusions.—Both complainant and defendants used applications of Rail Form A as their basis for their cost studies. The Rail Form A data were adjusted to reflect various operating characteristics and circumstances surrounding the transportation of the subject traffic. However, complainant developed separate applications of the formula for BN and SP and applied the resultant unit costs to the various operating statistics which the BN family lines and the SP, respectively, will generate in handling the subject traffic. On the other hand, defendants developed composite BN/C&S/FW&D and SP unit costs which were applied to the aggregate service units incurred over the entire movement. Defendants' procedure has the effect of producing a distortion in the resultant costs. The BN family lines account for approximately 78 percent of the total mileage operated in handling the subject traffic, while they account for only about 51 percent of the total operating expenses of the participating railroads. Since the unit costs of the carriers vary significantly, application of the composite or average unit costs to the total service units incurred will have the effect of producing distorted costs. It is also noted that complainant, in its cost studies, imputed the BN costs to the service units of C&S and FW&D (which are members of the BN family lines) as well as to the BN service units. SP costs were applied to SP service units. There is also some inequity in this procedure. However, in the absence of a showing that the unit costs of the C&S and FW&D are significantly different from those of the BN, it follows that the resultant costs would more closely approximate the costs incurred in handling the subject traffic than defendants' composite costs. It is also noted that the total costs computed by complainant, as revised, approximate the costs resulting from defendants' use of regional costs (complainant's revised—$7.73 per ton; defendants' regional average—$8.12 per ton), which, in the absence of other reliable data, could be used as a reasonable estimate of the cost of service of handling the traffic at issue.

With the exception of certain items discussed subsequently herein, both defendants' and complainant's costs were based on 1974 data indexed to the 1975 level. In its original cost presentation, complainant improperly developed and applied its updating indexes. Certain items of expense, crew wages, freight car depreciation, and interest included in the development of the indexes were excluded from the costs to

which the indexes were applied. In its revised cost presentation, complainant accepted and used the index developed by defendants.

In its revised costs, complainant used a tare weight of 30 tons per car, which is reportedly the average weight of the cars actually constructed for use in the subject traffic. This would be the appropriate tare weight to use, rather than the 31 tons used by defendants. Also, it appears that the appropriate load per car is the 102.5 tons per car which reflects the capacity of these cars. The same route miles were used by both parties. Complainant adjusted the mileage used to develop its original costs to conform with those shown by defendants. There is a slight difference in the round trip gross-ton-miles used by defendants and complainant. However, this difference has an insignificant effect on the costs. There is also some difference in the round trip diesel unit-miles used by the parties in their studies (defendants—21,451; complainant—20,519). This is the result of defendants' use of eight diesel units between Denver and Amarillo, whereas complainant's computations reflect use of seven diesel units between the same two points. For the remainder of the trip, the same number of units was used for the various segments. Complainant's use of seven units between Denver and Amarillo was based on its observation of another unit train between Denver and Pueblo (mentioned earlier herein), which constitutes the ruling grade between Denver and Amarillo. This other train consisted of 14,573 gross tons, as compared with the subject train consisting of 14,520 tons. Since movement of the involved traffic has not yet commenced and movement of another unit train pulling the same amount of gross tonnage required only seven diesel units, it appears that complainant's use of seven diesel units represents a reasonable estimate of the diesel units required. Consequently, complainant's round trip diesel miles are preferable for use herein.

Complainant contends that the switching factors utilized by defendants are merely unsupported estimates. It observed the switching operation at Denver and determined that 2.3 hours would be required per round trip, including allowance for nonproductive time. At Alliance, complainant accepted the 1 hour developed by defendants. The switching times used by complainant at Amarillo, Fort Worth, and San Antonio, like those of defendants, were estimated. Since movement of the subject traffic has not yet commenced, it is not possible to confidently state whose estimates are more accurate. Therefore, since it would appear that the railroad should be aware of what its requirements and limitations are, and in order to prevent an understatement of costs, switching times developed by defendants should be utilized.

Complainant states that it is providing a shop and inspection station at its power plant at which the cars will thoroughly be inspected after unloading. It would appear that because complainant is providing this service that the amount of time required for switching of bad order cars should be reduced. Therefore, the times developed by complainant (which amounts to half of that developed by defendants) for the switching of bad order cars should be used.

The crew costs computed by the parties differ somewhat; complainant lists $109.71 per carload, which defendants claim $118.01 per carload. The difference is caused by defendants inclusion of costs for deadheading the Sterling to Brush crew and the Fort Worth to Ennis crew and their use of composite general and transportation overheads. Complainant states that discussions with railroad operating personnel indicated these crews operate in turnaround service. Consequently, only half of the crew wages are assignable to the subject unit-train movement, and, therefore, complainant's costs would more closely approximate the actual crew costs incurred in handling the subject traffic.

Costs related to cars were appropriately excluded by both parties in that cars will be furnished by complainant.

For station clerical costs, complainant arbitrarily used a cost of $1.25 per carload because it felt that system average costs or the costing procedure used by defendants—the assumption that one-half the system average cost is related to the car and one-half is related to the shipment—would produce an excessive cost for the traffic in question. No other support was offered for use of the $1.25 cost per carload, and, therefore, that cost is unacceptable. Defendants' procedure would result in a cost more appropriately aligned to the clerical cost per car incurred in unit-train movements.

The parties gross-ton-mile costs differ by approximately $85 per carload. This is caused by defendants' use of composite unit costs which was previously noted to produce a distortion in the costs, and by defendants' imputation of a 14.8 percent return on embedded capital. The following excerpt is taken from *Rules to Govern Assembling & Presenting Cost Evidence*, 337 I.C.C., 298, 393, "Allowances for return on investment *** to the extent that they are admittedly intended to serve as an encouragement and incentive for continued or risk-bearing ownership, are in the nature of so-called pure economic profits and should not be taken into account as an element falling within the restrictive construction to be given here to costs. This is not to say, however, that such an allowance for profit is not to be considered as a factor in ratemaking ***. However, this so-called pure profit should be clearly distinguished from opportunity costs. The latter does not include a return on investment, simple, in the sense of, and as the equivalent to, cost of capital, but in no way connected with the risk or incentive of ownership. It is with respect to this limited effect to be given to return on investment as an element of cost that the examiner generally agrees with the explanation of the Cost Finding Section as to why equity capital invested in carriers' facilities should be treated in the same manner as similar debt capital."

In view of the above, defendants' imputation of a 14.8-percent return on embedded capital overstates the costs of the carriers. Complainant's use of the system average rate of return of 5.2 percent would more closely approximate the costs of the carriers.

Complainant computed a switching cost per carload of $6.14, as compared to defendants' computed cost of $17.10 per carload. In view of the previous discussion of switching factors, a switching cost of $14.11 per carload would be more accurate.

Both complainant and defendants have properly excluded that portion of train supplies and expenses which are unrelated to distance. This portion of the expense is not related to unit-train coal movements.

Costs for helper service computed by complainant and defendants differ only by 1 cent per carload.

Because of defendants' overstatement of the diesel unit miles, its locomotive unit-mile costs are also overstated. Complainant's computation of costs for this item is acceptable.

The major variance in the cost studies presented by the parties results from defendants' additives for locomotive and caboose capital costs for plant capacity expansion and for additional maintenance-of-way.

Defendants' computation of capital costs for locomotives which it maintains will be purchased for the subject traffic would appear to overstate the actual costs which will be incurred. First, as noted previously, the maximum number of units required has been overstated. Secondly, as noted by complainant, the spare margin allowance used is approximately twice that of the BN system average. Third, it appears that only six train sets are required, rather than the seven anticipated in defendants' computations.

Finally, defendants' capital cost factor of 15.5 percent appears to be excessive. From a practical standpoint, it is not possible to predict what the rate of return or cost of capital will be at some future time, if and when the diesel units are purchased. Consequently, the only viable alternative therein is to base the costs for this item on the only concrete evidence presented, i.e., capital cost computed at 8.5 percent, based on recent equipment trust certificate. Also, as noted by complainant, defendants used the rate of 15.5 percent, despite the fact that their current rate for outstanding equipment obligations is 6.37 percent.

Defendants' inclusion of the entire amount $117.16 per carload for plant capacity expansion is improper. A large portion of the expense for this plant expansion is not even predicted to be expended until 1980. In addition, even if these expenses were incurred solely as a result of the subject traffic, other traffic handled over the lines, as well as any future traffic which may come on line, will reap the benefits of this plant expansion. As a result, it would be unfair to single out only the subject traffic as being responsible for expenditure of these funds. Nonetheless, it is obvious that the proposed movement will necessitate some expense for expansion of the plant and consequently some consideration must be given to the expense of such expansion in determining an appropriate rate. Therefore, in our restatement of the costs, we have reflected consideration of expense for plant expansion to be expended during 1976 allocated to the subject traffic.

Inclusive of an amount of $23.23 per carload by defendants for alleged additional maintenance-of-way expense occasioned solely by initiation of the subject unit-train movement is improper. If an additive for this item were valid, the appropriate method would be to exclude all costs included in the Rail Form A system average data relating to maintenance-of-way, to construct a cost related solely to the lines over which the subject traffic moved, and to apportion these costs among the subject traffic and all other traffic which utilizes these lines. Complainant computed the BN system average maintenance-of-way cost per MGT to be $390. This amount cannot be verified. However, if this amount even vaguely approximated the system average cost, then the appropriate adjustment herein would be a reduction of the maintenance-of-way expense, rather than an increase as proposed by defendants.

It appears that complainant's revised costs are the best costs of record. However, as pointed out above some of those costs are understated and warrant some revision. With these revisions, the restated variable cost for the proposed San Antonio unit-coal-train movement amounts to $823.08 per carload, or $8.03 per ton.

In establishing a reasonable rate for such a large volume of traffic, as is involved herein, we would be remiss if only the variable level of costs were considered. Accordingly, we have expanded our revision of complainant's costs, discussed above, to the fully allocated level by application of the overall average percent variable as shown in I.C.C. Statement No. IC1-74. Application of this factor produces a fully allocated cost per ton of $10.16 or $1,014.40 per carload. We recognize that application of this factor may not produce a fully allocated cost specifically applicable to movement of the subject traffic. However, in view of the limited data available, and of the necessity for establishing a reasonable rate, we have taken this factor, as well as rate comparisons, into consideration in prescribing a just and reasonable rate.

APPENDIX F

31310

INTERSTATE COMMERCE COMMISSION

No. 36180[1]

SAN ANTONIO, TEXAS ACTING BY AND THROUGH ITS CITY PUBLIC SERVICE BOARD v. BURLINGTON NORTHERN, ET AL.

Decided April 3, 1981

San Antonio coal case reopened on remand from decision of the United States Court of Appeals for the District of Columbia Circuit. *San Antonio I* rate prescription, to extent it may have been restored by court's decision, vacated and San Antonio ordered to pay published tariff rate.

Curtis H. Berg, R. Eden Martin, Thomas W. Merrill, Richard J. Metzger, Thormund A. Miller, John Will Ongman, Alan R. Post, Howard J. Trienens, and *Stuart E. Vaughn* for railroad petitioners (in No. 37724).

Donald G. Avery, C. Michael Loftus, Arthur von Rosenberg, and *William L. Slover* for San Antonio (in No. 37724).

DECISION

BY THE COMMISSION:

In *San Antonio, Texas* v. *United States,* 631 F. 2d 831 (D.C. Cir. 1980), the United States Court of Appeals for the District of Columbia Circuit vacated our orders in *San Antonio II,* 359 I.C.C. 1 (1978) and *San Antonio III,* 361 I.C.C. 482 (1979) and remanded the case to the Commission. The purposes of this decision are, first, to reopen the *San Antonio II* and *III* proceedings and, second, to resolve an existing controversy over the currently effective and lawful rate that the railroads can charge San Antonio for coal movements pending our final decision on remand.

On February 6, 1981, Burlington Northern, Inc. (BN) and Southern Pacific Transportation Company (SP) petitioned the Commission for clarification of our decision of December 30, 1980 (notice served January 19, 1981), permitting a new tariff for the movement of coal in unit trains from Wyoming to San Antonio, TX to go into effect without suspension or investigation. The railroads seek clarification in order to terminate the controversy between the carriers and the city of San

[1] This decision also embraces No. 37724, Petition For Clarification, Burlington Northern, Inc. and Southern Pacific Transportation Co., San Antonio Coal Rate.

Antonio, TX over the currently applicable and legal rate for that coal movement.

The basic issue presented is whether the temporary rate prescribed by the Commission in *San Antonio, Tex.* v. *Burlington Northern, Inc.*, 355 I.C.C. 405 (1976) (*San Antonio I*) has any continuing validity. Generally, it is San Antonio's position that that rate prescription governs, following the decision of the court of appeals, vacating and remanding the Commission's subsequent rate prescriptions in *San Antonio II* and *San Antonio III*, at least until the *San Antonio I* prescription is formally lifted by the Commission.

It is the railroads' position, first, that the D.C. Circuit's decision did not have the effect of restoring the *San Antonio I* prescription (and that San Antonio's obligation is thus to pay the published tariff rate) and, in the alternative, even if the *San Antonio I* prescription was restored by the court's decision, that prescription was nevertheless lifted when the Commission recently allowed a higher rate to go into effect without suspension or investigation.

I. BACKGROUND

In *San Antonio I*, we prescribed a specific rate for unit-train coal service from Wyoming via BN and SP to San Antonio. We stated that our order was an interim measure, which was necessary in order to get the coal moving at once, and we expressly stated that the parties could thereafter petition for modification of the prescribed rate (355 I.C.C. at 417-18). In affirming, the United States Court Appeals for the Eighth Circuit agreed that the rate was temporary "and could be modified on application to the Commission." *Burlington Northern, Inc.* v. *United States*, 555 F. 2d 637, 648 (8th Cir. 1977).

Upon reopening in *San Antonio II, supra*, the Commission lifted the specific *San Antonio I* rate prescription and proceeded to determine a new maximum reasonable rate at a level higher than the specific rate prescribed in *San Antonio I*.

Both the railroads and San Antonio filed administrative appeals and the Commission served a further decision, *San Antonio III, supra* (served June 1, 1979). In that decision, we determined a new, slightly higher level for the maximum reasonable rate for service to San Antonio. This rate ceiling was determined by finding the level of fully allocated cost and multiplying by a factor of 1.07.

Both the railroads and San Antonio sought judicial review of the *San Antonio II* and *San Antonio III* decisions, the railroads contending that the rate ceiling imposed was arbitrarily low and San Antonio contending that

the rate ceiling was too high. As indicated above, our decisions were vacated and remanded.

In the meantime, the railroads' tariff, setting forth the rate filed by the railroads consistent with the maximum rate approved by the Commission in *San Antonio III* (as increased in subsequent general rate increases), remained on file with the Commission and in effect (subject to any further order of the Commission on remand).

On August 11, 1980, however, San Antonio stopped paying the rate set forth in the railroads' tariff ($21.95 per ton at that time), and began to pay a lower rate of $15.83 per ton, the level of the *San Antonio I* rate, as increased by subsequent general rate increases.

A. *I. & S. No. 9253, prepayment tariff.*

In an effort to collect the rate set forth in the tariff, SP, the delivering carrier, filed a tariff publication that would have had the effect of requiring San Antonio to prepay the tariff charges before service was rendered. In its decision of November 14, 1980, division 2 of the Commission suspended SP's prepayment tariff supplement. I. & S. No. 9253, *Prepayment of Rates—San Antonio Coal Movements.* The division stated its belief that because the Court of Appeals for the D.C. Circuit had set aside our decision in *San Antonio III*, the rate that the railroads were required to charge was that prescribed by the Commission in *San Antonio I*, as escalated by general rate increases.

In addition, the division noted our lack of jurisdiction under the Staggers Rail Act of 1980 (Staggers Act) with regard to rates less than 160 percent of variable cost, and further noted that the railroads are "free to file rates in conformance with these standards and to seek to have the *San Antonio I* prescription set aside."

B. *Petition for clarification of mandate.*

In response to that interpretation of the court of appeals' decision—i.e., that it restored the *San Antonio I* prescription—the railroads filed a petition for clarification of mandate with the court, urging the court to make clear that its decision does not suspend the effectiveness of the tariff rates on file with the Commission or require a rate rollback to the *San Antonio I* level (or any other level) pending further proceedings before the Commission.

San Antonio responded in opposition to the petition for clarification, arguing that when the court set aside the Commission decisions in *San Antonio II* and *III*, the *San Antonio I* rate governed because there was no valid order of the Commission permitting a higher rate.

In our response to that petition, we took the position that although we deemed restoration of the *San Antonio I* rate prescription a necessary result of the court's decision in the absence of a clarification of mandate

to the contrary, we argued that this seemingly required result would be inequitable. We pointed out that restoration of the *San Antonio I* rate prescription would result in the reinstitution of a rate that is several years out of date (October 1976). Even if the railroads were ultimately to establish that a rate in excess of that *San Antonio I* prescription was reasonable, the railroads would not be able to recoup revenues at that higher level because the Commission may not order shippers retrospectively to pay higher rates. Thus, for the period from August 11, 1980 forward (when San Antonio began paying the *San Antonio I* level rate, rather than the higher, published tariff rate), the railroads would not be able to collect anything over the *San Antonio I* level, regardless of our ultimate determination.

On the other hand, we noted that if the higher disputed rate has been and remains in effect during our reconsideration on remand, the Commission may order refunds to the shipper for past movements if it is ultimately found that the rate is unreasonably high. Accordingly, we joined the railroads in asking the court to clarify that it did not intend such a result. The court, however, has not yet acted on that petition for clarification.

C. *Suspension Docket No. 70225.*

Following division 2's decision in I. & S. No. 9253, *supra* (in which the division stated that the railroads are "free to file rates in conformance with these [statutory] standards and to seek to have the *San Antonio I* prescription set aside."), the railroads filed Supplement 4 to Freight Traffic BN 4173-A on November 26, 1980. That tariff supplement, published to become effective December 31, 1981, set forth a rate of $23.05 per ton—the *San Antonio III* level as escalated by subsequent general rate increases. In a justification statement filed with the tariff, the railroads submitted evidence tending to demonstrate that the proposed rate was (1) below the Commission's general jurisdictional threshold under section 202 of the Staggers Act (49 U.S.C. 10709(d))—i.e., less than 160 percent of variable cost, and (2) less than the specific statutory maximum for the *San Antonio* movement under section 203(c)(1)(A) of the Staggers Act, i.e., less than 162 percent of variable cost.

In response, San Antonio filed a "Petition in the Alternative," arguing that the Commission should reject or suspend on grounds that the D.C. Circuit's decision had reinstated the *San Antonio I* rate prescription which could be set aside only after adequate notice and hearing. San Antonio also submitted evidence challenging the railroads' cost evidence, arguing that if correctly computed, the new rate was not within the statutory standards.[2]

[2] San Antonio's witness concluded that the rate exceeded 130 percent of variable cost.

On December 30, 1980, we voted unanimously not to suspend or reject the tariff. Three Commissioners voted to investigate and three not to investigate the lawfulness of the rate under 49 U.S.C. 10707. This information was set forth in a notice published January 19, 1981, stating that the proposed rate would become effective without formal investigation on December 31, 1980.

After December 31, the effective date of the new tariff, San Antonio nevertheless continued to refuse to pay the higher rates. San Antonio filed a complaint in Federal District Court in Texas (*San Antonio, Texas* v. *Burlington Northern, Inc., et al.*, No. SA 81 CA 15, W.D. Tex., filed January 13, 1981) seeking enforcement of the 1976 *San Antonio I* rate prescription and an order enjoining the carriers from charging higher rates.

D. *Petition for clarification, No. 37724.*

On February 6, the railroads filed the instant petition (No. 37724, *supra*), requesting that we clarify our decision of December 30, 1980 by issuing an order expressly stating that the decision to allow the new tariff to become effective necessarily modified any prior rate prescription (i.e., *San Antonio I*). San Antonio opposes the petition, arguing that before the *San Antonio I* rate can be lifted, San Antonio is entitled to a "hearing."

E. *Subsequent developments.*

Following our decision to allow a higher rate to go into effect on December 31, 1981, and in light of San Antonio's continued refusal to pay anything in excess of the *San Antonio I* level, the carriers filed a second prepayment tariff to become effective on March 19, 1981. On March 18, the Commission voted unanimously to permit that tariff to go into effect. On March 19, however, the United States District Court for the Western District of Texas, in No. SA 81 CA 15, *supra*, issued a preliminary injunction, enjoining the railroads from conditioning service upon the prepayment of charges or upon payment of a rate which does not conform to the *San Antonio I* rate level "until such time as the Interstate Commerce Commission enters a final, appealable Order based on the [railroads] request for a tariff increase and for prepayment."

II. WHAT RATE SHOULD SAN ANTONIO BE PAYING?

At the outset, it is important to bear in mind that, although our decisions prescribing maximum rates in *San Antonio II* and *III* were vacated and remanded by the court of appeals, the court's decision does not indicate whether, in its view, the rates were too high or too low. The court's decision only concluded that the rationale of our decision was inadequately explained. The court of appeals merely remanded the case to the Commission for further consideration and explication of the maximum

reasonable rate for this movement. And although the petition for clarification is still pending before the court, we see no reason not to reopen the case to commence the inquiry required by the court's decision; and we hereby do so.

Pending our final decision in the reopened proceeding, however, an important and disputed question needs to be resolved: namely, what rate San Antonio should be paying pending our final decision in the remand proceeding. Should it or must it be the *San Antonio I* rate that we prescribed as an expressly interim measure in 1976?

With respect to that question, there are two periods that are principally relevant: first, the period from the court of appeals' decision to the present; and second, the period from the present to our final decision in the remand proceeding.

With respect to the first period, whether the effect of the court of appeals' decision was to reestablish the *San Antonio I* prescription as a matter of law is a question that is pending before that court, and therefore we believe it would be inappropriate for us to attempt to decide the matter.[3] Should the court hold (as we, along with the railroads, have urged) that its decision did not have the effect of restoring *San Antonio I*, then this controversy over the currently effective rate will be moot. San Antonio will be obligated to pay, *pendente lite*, the currently published tariff rate, which we have allowed to go into effect. Its obligation to have

[3] As indicated above, although we joined the railroads in urging the court to clarify its mandate as not restoring the *San Antonio I* rate, we nevertheless took the legal position that that result was a necessary implication of the court's vacating *San Antonio II* and *III*. Upon further consideration, we now believe our prior analysis to have been mistaken. We agree with the railroads that the Supreme Court's decisions in *Consolidated Rail Corp.* v. *National Ass'n of Recycling Industries, Inc.*, No. 80-568 (decided January 26, 1981) and *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1933) are controlling here.

Both those cases, as here, involved remands of Commission rate cases by courts of appeals for failure to adequately explain the basis of our rate reasonableness conclusions. In each, the court of appeals ordered that rate increases filed by carriers pursuant to the remanded order be suspended or rolled back pending a final determination on remand. In each case, the Supreme Court reversed those judicial rate suspensions as an unlawful intrusion on our jurisdiction.

Initially it appeared to us that the principle of those cases was not controlling because they did not involve a prior Commission prescription analogous to the *San Antonio I* prescription in this case. On further reflection, we are not pursuaded that that difference is material. Our decision in *San Antonio II* expressly modified the *San Antonio I* prescription and replaced it with, ultimately, the *San Antonio III* prescription. This, however, was merely a maximum rate prescription, and indeed the carriers were free (and urged by us) to file rates lower than the maximums prescribed. See *San Antonio II*, at 18. The carriers themselves then filed tariffs conforming to the *San Antonio III* maximum rate prescription. We do not believe that the court's decision vacating our *San Antonio II* and *III* orders had the necessary effect of voiding our decision to vacate the original *San Antonio I* prescription. Accordingly, when the court vacated our *San Antonio II* and *III* orders, the court's decision did not, under the principles of *Wichita Board of Trade* and *Consolidated Rail*, have the effect of vacating the tariffs the carriers filed in response to those Commission orders. Moreover, we believe the general teaching of those cases—that a reviewing court interferes with a matter entrusted to the Commission's jurisdiction by, in effect, prescribing rates pending a Commission decision on remand—should lead the court to clarify its mandate as not restoring *San Antonio I*.

paid the published tariff rate in effect for the period following the court's decision to the present would also appear clear.

On the assumption, however, that the court may conclude that the effect of its decision was to restore the *San Antonio I* prescription, we see no reason why this Commission could not now, as a prospective matter, formally lift that prescription, with the result that the carriers would be free to propose tariff increases in excess of that prescription (subject to the Commission's suspension and investigation powers) until the Commission's final decision in the remand proceeding. The Commission's power to vacate a prior prescription (assuming it to be in effect) cannot seriously be questioned. Cf. *Arizona Grocery* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932).[4]

Assuming that power, two questions remain, first, whether we should vacate the *San Antonio I* prescription; and second, whether we can do so in the present procedural posture of this case. We believe the answers to both questions are yes.

We have no difficulty in concluding that the *San Antonio I* prescription should be vacated and that the carriers' ratemaking initiative should not be constrained by that prescription pending our final decision on remand. Indeed, we agree with the railroads that that conclusion was implicit in our decision not to suspend or reject the tariff that was filed by the railroads to become effective December 31, 1980, and considered by the Commission in Suspension Docket No. 70225. Although we did not, in that decision, elaborate the reasons for that conclusion, we do so here.

First, there is little reason to believe that the *San Antonio I* rate prescription, which was established 5 years ago expressly as an interim measure to permit the traffic to begin moving, is supported either by current cost data or by current legal standards. For example, as we have noted, in the tariffs considered in Suspension Docket No. 70225 (i.e., *San Antonio III* as increased by subsequent general increases), the railroads submitted evidence purporting to show that that proposed rate was less than 160 percent of variable costs. It is true that San Antonio has disputed that evidence and that a full evaluation of the evidence remains to be completed. But not even San Antonio contends that its evidence would ultimately justify reimposition of the *San Antonio I* prescription.[5]

[4] Although *Arizona Grocery* affirmed the Commission's power to change a prescription by replacing it with another, no party has contended that the Commission is without power (in appropriate circumstances and under appropriate procedures) to vacate a prior prescription altogether and thus to restore ratemaking initiative to the carriers.

[5] In its "Petition in the Alternative," filed in opposition to the increase in Suspension No. 70225, *supra*, San Antonio's cost witness, after adjusting the railroads' cost evidence to reflect actual data, stated costs to be $12.80 per ton. The *San Antonio I* rate, at current levels ($15.83) is only 123 percent of variable cost, far less then the Staggers Act maximum of 162 percent (section 203(c)) or our jurisdictional threshold under 49 U.S.C. 10709.

A maximum rate prescription that necessarily results in a rate less than the Staggers Act's jurisdictional threshold cannot have continued validity.

Furthermore, there have been significant changes in the governing legal standards since the *San Antonio I* prescription was established. For example, because that prescription was based on a record antedating the Railroad Revitalization and Regulatory Reform Act (4R Act) and the more recent Staggers Act, we did not specifically consider, in arriving at our prescription, (1) whether the carriers have market dominance over this coal movement under 49 U.S.C. 10709; (2) the "rule of ratemaking" under 49 U.S.C. 10704 and the statutory mandate to specifically consider railroad revenue adequacy,[6] and (3) the specific Staggers Act provision regarding the San Antonio rate (section 203(b) of the Staggers Act). The fact that such factors were not considered in our 1976 decision in *San Antonio I* is in our view a more than adequate basis for now formally lifting the *San Antonio I* prescription.

Finally, and perhaps most importantly, it would simply be unjust to the railroads to allow the *San Antonio I* prescription to remain in effect *pendente lite;* i.e., until the Commission completes its reconsideration of the *San Antonio* rate controversy on remand. On remand, the Commission will determine what the maximum reasonable rate should have been, in accordance with the court's decision, for the period during which the vacated maximum rate prescriptions in *San Antonio II* and *III* were in effect. Should the Commission determine that the maximum reasonable rate for the period in controversy was in excess of the *San Antonio I* prescribed level, the railroads would, nevertheless, be unable to collect revenues at the level thus found to have been reasonable, if the *San Antonio I* prescription were considered to have continued validity during the period of the Commission's consideration on remand.

By contrast, San Antonio's position is fully protected, (even if forced to pay (*pendente lite*) a rate higher than that ultimately determined to have been the maximum reasonable rate, because the Commission can award San Antonio reparations under 49 U.S.C. 11705(b)(3).

San Antonio does not appear to challenge the foregoing propositions; instead, its principal contention is that we cannot, as a procedural matter, vacate the *San Antonio I* prescription in the present posture of the case. First, it contends that an informal, unreviewable decision not to reject or suspend a tariff[7] cannot have the substantive effect of lifting a prior rate

[6] In subsequent coal cases, including *San Antonio II* and *III* we sought to give specific consideration to the various ratemaking criteria set forth in 49 U.S.C. 10704 by, for example, allowing the carriers to recover the current cost of equity capital rather than computing capital c .s on the lower, embedded debt level, as in *San Antonio I.*

[7] *See Southern Ry.* v. *Seaboard Allied Milling Corp.*, 422 U.S. 444 (1979); *United States* v. *SCRAP*, 412 U.S. 669 (1973); *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658 (1963).

prescription, and that the railroads petition for clarification erroneously seeks to give it that effect. The railroads dispute San Antonio's contention that a no-suspend decision cannot have that effect, but we believe it is unneccessary to decide that question here. Whatever effect our no-suspension decision may or could have had on the *San Antonio I* prescription, there is no reason that we cannot now issue a substantive and judicially reviewable decision vacating that prescription and thus resolving the controversy about the effectiveness of tariff No. BN 4173-A. Assuming that other procedural requirements are satisfied, it is immaterial and merely a matter of form that our decision is in response to a petition to clarify a decision not to suspend a tariff.

San Antonio, however, makes the further argument that we cannot vacate the prescription because we have not given the parties the "full hearing" that 49 U.S.C. 10704 requires before the Commission can establish a prescription. It relies principally on *Arizona Grocery* v. *Atchison, T. & S.F. Ry., supra,* in which the Supreme Court stated, 284 U.S. at 387-88:

> Specific rates prescribed for the future take the place of the legal tariff rates theretofore in force by the voluntary action of the carriers, and themselves become the legal or published tariff rate and the lawful rate. The carrier cannot change a rate so prescribed and take its chances of an adjudication that the substituted rate will be found reasonable. It is bound to conform to the order of the Commission. If that body sets too low a rate, the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future. It cannot have reparation from the shippers for a rate collected under the order upon the ground that it was unreasonably low. This is true because the Commission, in naming the rate, speaks in its quasi-legislative capacity. The prescription of a maximum rate, or maximum and minimum rates, is a legislative quality as is the fixing of a specified rate.

In essence, it appears to be San Antonio's position that the *San Antonio I* prescription cannot be lifted until the Commission lifts it after a hearing of equal dignity to the one that produced the prescription.

In our view, however, neither the statute nor *Arizona Grocery* requires the same kind of hearing for vacating a prior prescription (and thus returning ratemaking initiative to the carriers subject to normal Commission regulation) as for prescribing a specific prescription in the first place; and in this case all parties have had more than an adequate opportunity to be heard on the issue before us. Assuming that a hearing is required to vacate a prior prescription,[8] we do not believe that a full evidentiary hear-

[8] The railroads argue that when the Commission prescribes a new rate, 49 U.S.C. 10704(a)(1) requires a hearing. But the Commission's power to modify, suspend, or set aside a prior prescription is not governed by section 10704(a)(1), but by section 10324(b), which provided that the Commission may "change, suspend, or set aside" any prior Commission action "on notice," the manner of such notice to be determined by the Commission. They argue that the Commission's notice of its decision made on December 30, 1980, provided ample notice that the *San Antonio I* prescription had been set aside to allow the new rate to become effective.

ing of the type ostensibly contemplated by San Antonio is necessary or appropriate in this instance. As the courts have frequently stated, the type of hearing that is required and appropriate in particular circumstances depends on the issues involved. See, *e.g., United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973). When the issue is what specific prescription to establish, precise analysis of cost data, comparable rates and many other factual issues is necessary, and as to those issues, a full evidentiary hearing is often appropriate. In contrast, the question here is whether to vacate a previously established prescription and thus to restore ratemaking initiative to the carriers subject to normal Commission review, and that issue turns on an assessment of the likelihood that the factual and legal underpinnings of the original prescription continue to have current validity. That assessment does not require the same kind of full evidentiary hearing that may be appropriate for establishing a specific rate prescription.

We addressed a similar question recently *Consolidated Rail Corp.—Eliminate Dk. No. 28300*, 364 I.C.C. 615 (1981). In that case, a number of parties claimed that in light of extensive proceedings culminating in the original rate prescription and its longstanding use, it would be improper for us to remove the prescription based on the single set of comments filed by the parties in that case. We stated:

> We disagree. The Commission has a continuing obligation to review it prior actions to ensure they are consistent with current law and policy. *The fact that removal of the prescription is accomplished more quickly than its establishment does not mean that removal is not justified.* [364 I.C.C. at 617, emphasis supplied].

In this case, we believe the parties have had and have exercised an opportunity to be heard that is fully adequate to resolve the question before us. In filing a rate increase following the Commission's decision in I. & S. No. 9253, *supra* (i.e., Suspension Docket No. 70225), the railroads filed a justification statement, including evidence on the cost of service, to which San Antonio replied, challenging that evidence and setting forth its arguments as to why the rate should not be allowed to become effective. Indeed, the carriers and San Antonio have been given a full opportunity to present their arguments concerning the continuing validity of the *San Antonio I* prescription in three separate forums, I. & S. No. 9253, *supra*, Suspension Docket No. 70225, and, most importantly, the instant petition for clarification. The issues have been fully addressed.

In sum, we find that our prior rate prescription in *San Antonio I, supra,* to the extent that it may have been restored by the decision of the United States Court of Appeals for the District of Columbia Circuit, should be vacated.

It is ordered:

1. The rate prescribed by the Commission in *San Antonio I*, 355 I.C.C. 405 (1976) shall have no further force and effect.

2. San Antonio, TX , shall pay the published tariff rate, until such time as the Commission determines that rate to be in excess of a maximum reasonable rate or otherwise unlawful.

3. No. 36180 is hereby reopened for the purpose of reconsideration of the maximum rate prescribed in *San Antonio III*, in accordance with the decision of the United States Court of Appeals for the District of Columbia Circuit.

By the Commission, Acting Chairman Alexis, Commissioners Gresham, Clapp, Trantum and Gilliam.

AGATHA L. MERGENOVICH,
Secretary.

(SEAL)

364 I.C.C.

APPENDIX G

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980

No. 78-2051

San Antonio, Texas Acting By And Through Its City Public Service Board,

Petitioner

v.

The United States of America and Interstate Commerce Commission,

Respondents

Burlington Northern Inc., et al.,

Intervenors

United States Court of Appeals for the District of Columbia Circuit

FILED AUG 26, 1981

GEORGE A. FISHER
Clerk

BEFORE: Robinson, Chief Judge; Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards, and Ginsburg, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed in connection with this Court's clarification of the mandate herein, and of the letter filed in connection therewith, see Rule 28(j), FRAP, having been circulated to the full Court, and no judge in regular active service having requested a vote in connection therewith, it is

ORDERED, by the Court, *en banc,* that petitioners/intervenors' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:

GEORGE A. FISHER
Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980

No. 78-2051

San Antonio, Texas Acting By And Through Its City Public Service Board,

Petitioner

v.

The United States of America and Interstate Commerce Commission,

Respondents

Burlington Northern Inc., et al.,

Intervenors

United States Court of Appeals for the District of Columbia Circuit

FILED AUG 26, 1981

GEORGE A. FISHER
Clerk

BEFORE: Robb, Wilkey, and Wald, Circuit Judges

ORDER

Upon consideration of petitioners/intervenors' petition for rehearing in connection with this Court's clarification of the mandate herein, and of the letter filed in connection therewith, pursuant to Rule 28(j), Federal Rules of Appellate Procedure, it is

ORDERED, by the Court, that petitioners/intervenors' aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:

GEORGE A. FISHER
Clerk

Joint Appendix

Office - Supreme Court, U.S.
FILED
MAY 17 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1008

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

BURLINGTON NORTHERN INC. AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed November 24, 1981
Certiorari Granted March 1, 1982

TABLE OF CONTENTS

		PAGE
1.	Relevant Docket Entries	1
2.	Excerpts from Railroads' Petition to Reopen Proceedings for Receipt of Additional Evidence and Modification of Outstanding Rate Order	6
3.	Excerpts from Brief of Petitioner San Antonio, Texas, Acting By and Through Its City Public Service Board, October 1, 1979	8
4.	Excerpts from Brief of Railroad Respondents-Intervenors, December 19, 1979	11
5.	Prepayment of Rates—San Antonio Coal Movements, I & S Doc. No. 9253, November 14, 1980	13
6.	Excerpts from Petition for Clarification of Mandate, November 22, 1980	16
7.	Excerpts from Response of Interstate Commerce Commission to Petition for Clarification of Mandate, December 24, 1980	19

Note: The following decisions and orders have been omitted from the Joint Appendix and may be found in the Appendix to Petition For Writ of Certiorari, filed November 24, 1981:

1. *San Antonio, Texas* v. *Burlington Northern, Inc.*, 355 I.C.C. 405 (1976) ("*San Antonio I*") .....App. to Cert. Petn. E
2. *San Antonio, Texas* v. *Burlington Northern, Inc.*, 359 I.C.C. 1 (1978) ("*San Antonio II*").....App. to Cert. Petn. D
3. *San Antonio, Texas* v. *Burlington Northern, Inc.*, 361 I.C.C. 482 (1979) ("*San Antonio III*") ...App. to Cert. Petn. C
4. *San Antonio, Texas* v. *United States*, 631 F.2d 831 (D.C. Cir. 1980) .....App. to Cert. Petn. B
5. *San Antonio, Texas* v. *Burlington Northern*, 364 I.C.C. 887 (1981) .....App. to Cert. Petn. F
6. *San Antonio, Texas* v. *United States*, 655 F.2d 1341 (D.C. Cir. 1981) .....App. to Cert. Petn. A
7. Orders of the United States Court of Appeals for the District of Columbia Circuit denying petitions for rehearing and/or rehearing *en banc*, August 26, 1981 .... App. to Cert. Petn. G

RELEVANT DOCKET ENTRIES

Interstate Commerce Commission

Docket No. 36180

Date	Filings—Proceedings
06-16-77	Railroads' Petition to Reopen Proceedings In Receipt Of Additional Evidence and Modification Of Outstanding Order
10-25-78	Order [*San Antonio, Texas* v. *Burlington Northern, Inc.*, 359 I.C.C. 1 (1978)]
05-23-79	Order [*San Antonio, Texas* v. *Burlington Northern, Inc.*, 361 I.C.C. 482 (1979)]
12-26-79	Order [*San Antonio, Texas* v. *Burlington Northern, Inc.*, 362 I.C.C. 161 (1979)]
04-03-81	Order [*San Antonio, Texas* v. *Burlington Northern, Inc.*, 364 I.C.C. 887 (1981)]

United States Court of Appeals For the District of Columbia

Docket No. 78-2051

Date	Filings—Proceedings
(D)10-25-78	4-Petitioner's [San Antonio's] petition for review of an order of the USA & ICC (m-25)
(T)11-22-78	4-Petitioner's [San Antonio's] motion for stay pending judicial review (p-22)
[11-24-78]	[State of Texas petition for review in No. 78-2216]
[11-29-78]	[United States Department of Energy petition for review in No. 78-2224]

Date	Filings—Proceedings
(E)11-30-78	Per Curiam order denying petitioner's [San Antonio's] motion for stay (see order). In any event, if petitioners are successful on appeal, their rights will be protected by this Court's ultimate judgment on 49 U.S.C. § 8 (1959), and therefore no irreparable injury is shown; Bazelon, Leventhal and Robb, CJ's; (Judge Leventhal did not participate in this order)
(E)12-5-78	Clerk's order, sua sponte, that Nos. 78-2051, 78-2216 and 78-2224 are consolidated. The briefing of these cases are [sic] deferred pending a scheduling order
[12-21-78]	[Burlington Northern, Inc., The Colorado and Southern Railway Co., Fort Worth and Denver Railway Co., and Southern Pacific Transportation Co. petition for review in No. 78-2307]
(C)01-02-79	Clerk's order, sua sponte, that Nos. 78-2051, 78-2216, 78-2224 & 78-2307 are consolidated; The Certified Index in 78-2051 shall be deemed filed in 78-2216, 78-2224 and 78-2307; If any supplement to the certified index is necessary in respect to these cases, that supplement should be filed with [sic] 15 days of this order (1/17/79); The order entered 12/5/78 in 78-2051, et al. deferring briefing pending a scheduling order shall apply to No. 78-2307
(E)4-5-79	Clerk's order that briefing is deferred pending disposition by respondent of its reconsideration of that order
[6-28-79]	[State of Texas petition to amend petition for review]

Date	Filings—Proceedings
(C)07-16-79	Clerk's order granting petitioners' [sic] [State of Texas] motion to amend petitions for review and the motion of United States to extend time to comply with the Court's order is granted to 7/26/79
[7-25-79]	[San Antonio petition to amend petition for review]
(T)8-10-79	Clerk's order granting petitioner's [San Antonio's] motion to amend petition for review to include the decision and order of the ICC in ICC Docket No. 36180 served June 1, 1979
(D)10-01-79	15-Petitioners' (Railroad) brief (m-1)
(D)10-02-79	15-Petitioners' (San Antonio) brief (m-1)
(D)10-02-79	7-Joint Appendix (Vols. I-V) (m-1)
(T)11-29-79	15-ICC's brief (m-28)
(T)11-29-79	15-Respondent's (US) brief (m-27)
(C)12-19-79	15-Petitioner's (San Antonio's) reply brief (m-19)
(G)12-26-79	15-Petitioner's (Railroad) reply brief (m-19)
(E)1-22-80	Argued before Robb, Wilkey & Wald, CJ's
(R)6-9-80	Opinion for the Court filed by Circuit Judge Wilkey
(R)6-9-80	Judgment vacating the orders of the Commission and remanding the cases for proceedings not inconsistent with the opinion of this Court filed herein this date
(B)07-16-80	Per Curiam order, en banc, that intervenors' (Burlington Northern, Inc., et al.) suggestion for rehearing, en banc, is denied; CJ Wright, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards, and Ginsburg, CJ's

Date	Filings—Proceedings
(B)07-16-80	Per Curiam order that intervenors' petition, insofar as it seeks rehearing, is denied and to the extent that it seeks clarification, said petition is granted in part and denied in part. Clarification of the opinion for the Court filed on 6-9-80, is accomplished by the deletion of the last three sentences of footnote 68, on page 26 of the slip opinion. See order for amendment; Robb, Wilkey, and Wald, CJ's
(H)7-24-80	Certified copy of opinion and judgment issued to General Counsel, ICC. Costs will issue later
(T)11-24-80	4-Intervenors' [Railroads'] petition for clarification of mandate (m-22)
(T)12-02-80	4-Petitioners' [sic] [San Antonio's] opposition to petition for clarification of mandate (m-2)
12-08-80	4-Intervenor's [sic] [Railroads'] reply to petitioners' [sic] opposition to petition for clarification of mandate (m-8)
(B)12-29-80	4-ICC's response to intervenors' [railroads'] petition for clarification of mandate (m-24)
(T)01-02-81	4-Petitioners' [sic] [San Antonio's] reply to ICC's response to petition for clarification of mandate (m-2)
(D)1-5-81	4-Intervenors' (Burlington, et al.) reply to ICC's response to petition for clarification of mandate (m-5)
[1-29-81]	[Railroads' letter to clerk]
[1-30-81]	[San Antonio's response to Railroads' letter to Clerk]
[4-6-81]	[Railroads' Supplemental Memorandum In Support of Petition for Clarification]

Date	Filings—Proceedings
[4-8-81]	[ICC's letter to Clerk transmitting decision]
[4-21-81]	[San Antonio's Reply to Supplemental Petition]
(R)6-30-81	Opinion for the Court filed by Circuit Judge Wilkey on Petition for Clarification of Mandate
(R)6-30-81	Per Curiam order that the [sic] on the matter of the Petition for Clarification of Mandate the Commission is now entirely in Authority in accordance with the opinion of this Court filed herein this date.
(B)08-26-81	Per Curiam order that petitioners/Intervenors' [Railroads'] petition for rehearing is denied; Robb, Wilkey and Wald, CJ's
(B)08-26-81	Per Curiam order, en banc, that petitioners/intervenors' [Railroads'] suggestion for rehearing, en banc, is denied; CJ Robinson, Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, CJ's
(V)03-04-82	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari filed in SC No. 81-1008 on 03/01/82
(C)03-15-82	Per Curiam order, sua sponte, that the certified copy of judgment and copy of opinion in lieu of formal mandate issued to the ICC on July 24, 1980 is hereby recalled and the Commission is directed to return to this Court forthwith the documents issued in lieu of formal mandate; Robb, Wilkey and Wald, CJ's

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. 36180

SAN ANTONIO, TEXAS
ACTING BY AND THROUGH ITS
CITY PUBLIC SERVICE BOARD

v.

BURLINGTON NORTHERN INC., ET AL

PETITION TO REOPEN PROCEEDINGS FOR RECEIPT OF ADDITIONAL EVIDENCE AND MODIFICATION OF OUTSTANDING ORDER

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Dated: June 14, 1977

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. 36180

SAN ANTONIO, TEXAS
ACTING BY AND THROUGH ITS
CITY PUBLIC SERVICE BOARD

v.

BURLINGTON NORTHERN INC., ET AL

PETITION TO REOPEN PROCEEDINGS FOR RECEIPT OF ADDITIONAL EVIDENCE AND MODIFICATION OF OUTSTANDING ORDER

Come now Burlington Northern Inc., Colorado and Southern Railway Company, The Fort Worth and Denver Railway Company and Southern Pacific Transportation Company and respectfully petition the Interstate Commerce Commission to reopen the above docketed proceeding for the receipt of additional evidence and for modification of the order herein decided October 13, 1976, served October 14, 1976. In support thereof petitioners respectfully allege and state as follows:

• • • •

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2051

SAN ANTONIO, TEXAS, ACTING BY AND THROUGH ITS CITY PUBLIC SERVICE BOARD, *Petitioner*
THE STATE OF TEXAS, *Intervenor-Petitioner*

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Respondents*
BURLINGTON NORTHERN, INC., THE COLORADO AND SOUTHERN RAILWAY COMPANY, FORT WORTH AND DENVER RAILWAY COMPANY, and SOUTHERN PACIFIC TRANSPORTATION COMPANY, *Intervenor-Respondents.*

On Petition to Review Orders of the Interstate Commerce Commission

BRIEF OF PETITIONER SAN ANTONIO, TEXAS ACTING BY AND THROUGH ITS CITY PUBLIC SERVICE BOARD

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Date Due: October 1, 1979

• • • •

SUMMARY OF ARGUMENT

The Commission authorized a huge increase in the prescribed coal rate to San Antonio on the grounds that such an increase was required by the new ratemaking guidelines in Section 10704(a)(2) of the Act, which call upon the Commission to assist the railroads in attaining adequate revenue levels. The Commission, despite numerous false starts, has never defined precisely what constitutes adequate railroad revenue levels. It has, however, repeatedly concluded that adequate revenues cannot be measured simply by rate of return and that other financial criteria must be employed. Despite its several pronouncements that revenue adequacy cannot be gauged solely by reference to rates of return, the Commission found that it could not find that the railroads had achieved revenue adequacy mentioning only their rates of return on past investment and ignoring all other financial indicators and especially their future flow of funds.

Motivated entirely by its impressions of revenue adequacy, arrived at by some unarticulated process, the Commission fashioned a gigantic increase in the coal rate to San Antonio. The increase was implemented solely on the basis of cost evidence which was both inadequate and erroneous. Because the Commission failed to require the railroads to produce actual data on San Antonio's trains, the cost data of record was based in large part on system average information which was the best that San Antonio could secure. While system data often developed lower costs than those pressed by the railroads on the basis of various theories, they were higher than actual costs. The Commission's cost findings were further flawed by their reliance on erroneous cost additives. In its novel attempt to make rates on the basis of costs alone, the Commission failed to reach adequate findings on its handling of federal taxes for ratemaking purposes and departed from its own recently announced pro-

cedures. Because it relied solely on cost evidence, the Commission abandoned its traditional approach to ratemaking. These many errors were compounded by the Commission's arbitrary 7 percent additive for revenue need.

• • • •

CONCLUSION

For all of the above reasons, San Antonio requests that the Court vacate the Commission's Orders in *San Antonio II* and *San Antonio III* modifying its earlier rate prescription. Since there would then be no order of the Commission altering its original rate prescription, the carriers tariffs would have to be amended to reinstate the rate level prescribed in *San Antonio I*.

Respectfully submitted,

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Washington, D.C. 20036

Date Due: October 1, 1979

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 78-2051, 78-2216 and 78-2307

SAN ANTONIO, TEXAS, ACTING BY AND THROUGH ITS CITY PUBLIC SERVICE BOARD,
Petitioner in No. 78-2051,

THE STATE OF TEXAS,
Petitioner in No. 78-2216,

BURLINGTON NORTHERN INC., THE COLORADO AND SOUTHERN RAILWAY COMPANY, FORT WORTH AND DENVER RAILWAY COMPANY, and SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioners in No. 78-3207,

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
Respondents,

BURLINGTON NORTHERN INC., THE COLORADO AND SOUTHERN RAILWAY COMPANY, FORT WORTH AND DENVER RAILWAY COMPANY, SOUTHERN PACIFIC TRANSPORTATION COMPANY, SAN ANTONIO, TEXAS, ACTING BY AND THROUGH ITS CITY PUBLIC SERVICE BOARD, and THE STATE OF TEXAS,
Intervenors.

On Petitions for Review of Orders of The Interstate Commerce Commission

BRIEF OF RAILROAD RESPONDENTS-INTERVENORS

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December 19, 1979

• • • •

CONCLUSION

For the reasons set forth in the opening brief of Railroad Petitioners, and for reasons set forth above, the petition for review in No. 78-2307 should be granted, and the orders in *San Antonio II* and *San Antonio III* should be set aside.

For other reasons set forth above, the petitions for review in Nos. 78-2051 and 78-2216 should be dismissed. If, however, the Court should grant either of the petitions for review in Nos. 78-2051 and 78-2216, the appropriate relief would not be, as Petitioner San Antonio suggests, to reinstate the rate level prescribed in *San Antonio I*. The rate involved here is a carrier-made rate—not a Commission-prescribed rate, and the Supreme Court has expressly ruled that when Commission decisions in rate cases are set aside, the existing carrier-made rates continue in effect unless and until changed by the Commission upon remand. *Atchison, T. & S. F. Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 819, 828-29 (1973). Shippers such as San Antonio are not injured by such a procedure because the Commission has the authority to order reparations in appropriate cases (49 U.S.C. § 11705(b)(2)).

Respectfully submitted,

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December 19, 1979

INTERSTATE COMMERCE COMMISSION

DECISION

INVESTIGATION AND SUSPENSION DOCKET NO. 9253

PREPAYMENT OF RATES—SAN ANTONIO COAL MOVEMENTS

Decided: November 14, 1980

By tariff publication in Supplement 3 to the Official List of Open and Prepay Stations, ICC OPSL 6000-B, issued by Station List Publishing Company, Agent, filed with this Commission on November 13, 1980, to be effective November 16, 1980. The Southern Pacific Transportation Company proposes to require that freight charges on interstate shipments of coal to Elmendorf, Texas be prepaid. The instant proposal in the Official List of Open and Prepay Stations does not change the amount of the published rate between the stations in Wyoming and Elmendorf, Tx., which is set out in the Burlington Northern Inc., Tariff ICC NB 4173-A.

The City Public Service Board of San Antonio, Texas, has submitted a verified complaint seeking suspension of the proposal. The City Public Service Board of San Antonio, Texas, (CPSB) is concerned that the provisions may have the effect of halting service to San Antonio, TX., unless CPSB pays a freight rate which it believes violates a valid Commission order. It has also stated that the proposal is part of a larger dispute currently before the Commission in No. 36180, *San Antonio, Texas, Acting By and Through Its City Public Service Board* v. *Burlington Northern, Inc., Et Al.*, dated October 13, 1978, and later. It believes it has

been unfairly singled out for this unusual treatment. We will suspend and investigate the proposal. The SP justifies its action on the grounds that San Antonio refuses to pay the applicable rate on file which was filed pursuant to our prescription in the *San Antonio III* case. In that our order in *San Antonio III* has been vacated by the Court of Appeals for the District of Columbia, we believe, that the rate SP can lawfully charge for this service is the prescribed rate in *San Antonio I* as escalated by general increases. Consequently, SP is without legal authority to demand prepayment of any higher rate. Therefore, we will suspend the protested tariff publication that seeks to require prepayment.

We note that under the Staggers Rail Act of 1980, we are without jurisdiction to find unreasonably high a rate equal to or less than 160 percent of the variable cost of the movement and that for this movement we may not allow rates to exceed 162 percent of the variable costs. The involved railroads are free to file rates in conformance with these standards and to seek to have the *San Antonio I* prescription set aside.

IT IS ORDERED:

An investigation into all issues relating to the lawfulness of the schedules described below is instituted. The Southern Pacific Transportation Company is named as respondent.

Official List of Open and Prepay Stations
Station List Publishing Company, Agent
ICC OPSL 6000-B,

In Supplement 3, under Southern Pacific Lines—Southern Pacific Transportation Company, Station 24675, Elmendorf, TX, the correction shown in Note 219, the addition of Note 242, and the elimination of Note 244.

The operation of the schedules is suspended to and including June 15, 1981. If these schedules are changed, amended, or reissued upon termination of the suspension period and the investigation has not been concluded, the changed, amended, or reissued schedules will be included in this investigation.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

This was considered in Suspension Case No. 70203.

By the Commission. Division 2, Commissioners Gaskins, Alexis, and Gilliam.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 78-2051, 78-2216, and 78-2307

San Antonio, Texas Acting By and Through Its City Public Service Board,

Burlington Northern Inc., Southern Pacific Transportation Company, et al.,

Petitioners,

v.

United States of America and Interstate Commerce Commission,

Respondents.

PETITION FOR CLARIFICATION OF MANDATE

A panel of this Court, Judges Robb, Wilkey and Wald, issued its decision (by Judge Wilkey) in the above case on June 9, 1980, setting aside a decision and order of the Interstate Commerce Commission prescribing a maximum reasonable rate for unit train coal service by rail to San Antonio, Texas, from Cordero Junction, Wyoming. The Court held that the Commission's determination of a rate ceiling equal to fully allocated cost multiplied by 1.07 was not supported by "a thorough analysis of the relevant interests" (slip, at 40). The Court also held that the Commission had erred in its treatment of certain cost issues.

The Court then vacated the Commission's determination of a maximum rate ceiling and remanded the case "for

proceedings not inconsistent with this opinion" (slip, at 48).*

The Commission has taken no action to determine a maximum reasonable rate for the San Antonio coal movement pursuant to this Court's remand. It has not reopened the record for submission of further evidence, and it has issued no further decision or order in Docket No. 36180, the *San Antonio* coal rate complaint proceeding, notwithstanding the passage of almost 6 months since the Court's decision. However, on November 14, 1980, the Commission served a two-page order in I&S Docket No. 9253. In this order the Commission stated that the effect of this Court's decision of June 9 was to suspend or set aside the railroads' presently-filed rate and to require the railroads to charge an earlier—and much lower—rate prescribed in 1976 (as subsequently escalated tc reflect increased costs):

> "In that our order in *San Antonio III* has been vacated by the Court of Appeals for the District of Columbia, we believe, that the rate SP [Southern Pacific, the delivering carrier] can lawfully charge for this service is the prescribed rate in *San Antonio I* as escalated by general increases."

A copy of the Commission's order in I&S 9253 is attached hereto as Appendix A.

The railroads, Burlington Northern Inc. ("BN") and Southern Pacific Transportation Co. ("SP"), believe that the Commission's decision is based on a misconstruction of this Court's decision and mandate. They therefore ask the Court to clarify its mandate to make it clear that in setting aside the Commission's *order* in *San Antonio III* approving a maximum reasonable rate equal to 107 percent of fully

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* This Court modified its decision with respect to one of the costing issues by order of July 16, 1980.

allocated cost, this Court did not enjoin the railroads from charging the existing tariff rate, nor did it require that that rate be rolled back to the 1976 *San Antonio I* level (as escalated) pending the outcome of the review proceedings before the Commission.*

• • • •

* As the Court has recognized, an appellate court " 'has continuing power to accept and pass upon a petition to clarify an outstanding mandate.' " *Dilley* v. *Alexander*, U.S.App.D.C. , 627 F.2d 407 (1980), *quoting Greater Boston Television Corp.* v. *FCC*, 149 U.S.App.D.C. 322, 463 F.2d 268, 278 (1971).

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 78-2051, 78-2216, 78-2307

SAN ANTONIO, TEXAS ACTING BY AND THROUGH ITS CITY PUBLIC SERVICE BOARD, et al
Petitioners

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Respondents

RESPONSE OF INTERSTATE COMMERCE COMMISSION TO PETITION FOR CLARIFICATION OF MANDATE

• • • •

DISCUSSION

The railroads request the Court to make it clear that its decision in the above case did not enjoin the railroads from collecting the *San Antonio III* tariff rate or require restoration of the *San Antonio I* rate level pending the outcome of the Commission proceedings on remand (Petition 3, 9-10). The Commission wishes to clarify for the Court the reasons that it reached the legal conclusion that the *San Antonio I* rate is the only current lawful rate and to join in the railroads' request for clarification by the Court.

It is undisputed that the Court's *San Antonio* decision vacated the orders prescribing the *San Antonio II* and *San*

Antonio III rates[4] (slip. op 48). What is at issue here is the effect of the vacating of a Commission order prescribing present and future railroad rates.

In the November 4, 1980, order, the Commission stated that because its order in *San Antonio III* was vacated by the Court, the SP can lawfully charge only the prescribed rate in *San Antonio I* as escalated by general increases, until the railroads seek to have the *San Antonio I* prescription set aside and the Commission acts on that request. The theory behind the Commission's decision is that when an order is vacated, it is voided and is as if it never existed. The applicable rate (until a petition to change it is granted) is necessarily the last valid prescribed rate that was not vacated by a court, *i.e.*, the *San Antonio I* rate.

The railroads claim that this interpretation is precluded by *Atchison Topeka & Santa Fe Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973) (Petition 13-18). The Commission believes that *Wichita* is, in fact, not inconsistent with the Commission's interpretation expressed in the November 14, 1980, order. In *Wichita*, no rate prescription by the Commission was involved. Rather, the Commission there approved railroad-initiated charges for the inspection of grain while in transit. The Supreme Court held that the Commission had not stated its reasons with sufficient clarity to facilitate proper review and remanded the case to the

[4] The railroads argue (Petition 7, 12) that no rate prescription was involved because the Commission prescribed a maximum reasonable level rather than a particular rate. But in *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 204 U.S. 370, 388 (1932), the Supreme Court made clear that a rate prescription does not necessarily involve a fixed rate. The Court found that a Commission order prohibiting a company from charging rates higher than those prevailing in 1913 "in effect prescribed maximum rates for the service."

Commission for it to balance the interests of the parties, but the disputed rate was allowed to remain in effect.

Wichita, therefore, seems to stand for the principle that reviewing courts may not ordinarily enjoin or change a rate, but rather must remand the proceeding to the Commission for its determination. Contrary to the railroad's apparent belief (Petition 18), however, the Commission's determination that the *San Antonio I* rate now applies is not based on any notion that the Court suspended or enjoined the *San Antonio II and III* rates. On the contrary, it is the Commission's prior prescription of the *San Antonio I* rate that results in the Commission's conclusion that the *San Antonio I* rate is now applicable. As discussed above, the *San Antonio II and III* rates were vacated by the Court so that they no longer exist. Because of this, the Commission believes that the Court's action restores the *San Antonio I* prescribed rate since it is the last valid prescribed rate not vacated by the Court, until the railroads successfully petition the Commission to set the prescription aside.

Thus, while under *Wichita* a carrier-initiated rate remains in effect during remand proceedings, it appears, and the Commission found here, that where there has been a prior rate *prescription,* a court reversal has the result of putting the prior rate prescription back into effect, based on *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 284 U.S. 370 (1932).

In *Arizona Grocery* the Supreme Court established that affirmative Commission action is required to modify a prescribed rate. The Supreme Court stated (284 U.S. at 387-388):

> Specific rates prescribed for the future take the place of the legal tariff rates theretofore in force by the

> voluntary action of the carriers, and themselves become the legal rate . . . The carrier cannot change a rate so prescribed and take its chances of an adjudication that the substituted rate will be found reasonable. It is bound to conform to the order of the Commission. If that body sets too low a rate, the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future. It cannot have reparation from the shippers for a rate collected under the order upon the ground that it was unreasonably low. This is true because the Commission, in naming the rate, speaks in its quasi-legislative capacity. The prescription of a maximum rate, or maximum and minimum rates, is as legislative in quality as the fixing of a specified rate.

Accordingly, the Commission believes that the Court's action vacating the *San Antonio II* and *San Antonio III* rate decisions necessarily restored the *San Antonio I* rate as escalated by general rate increases.

The Commission recognizes, however, that this seemingly required interpretation will have inequitable results in certain circumstances, such as here. It results in the reinstitution of a rate from the date of the Court's decision that is several years out of date (October 1976 rate). This deprives the railroads of revenues which they cannot regain, since the Commission may not order shippers to retrospectively pay higher rates for movements from June 9, 1980 to the present if a prescribed rate was restored by the Court action. On the other hand, if the higher disputed rate has been and remains in effect during agency reconsideration, the Commission may order refunds to the shipper for past movements if it ultimately finds that the rate is unreasonably high.

In the circumstances of this case, we do not think the result of the reviewing court's order should have this anomalous result, where the agency decisions are simply remanded for reconsideration and elaboration. We believe

that the Court has the power to clarify that it did not intend such a result in this case. Such a clarification would avoid a serious inequity and be consistent with the spirit and intent of *Wichita*. Because we think that the Commission's legal conclusion on the current lawful rate necessarily follows from the Court's decision and that the Court did not intend that result, we request that the Court clarify its decision to so indicate.

As to the future lawful rate, the Commission stated in its November 14, 1980 decision that the railroads are now free to seek to have the prescribed rate set aside and to request new rates in conformance with the standards of the Staggers Rail Act of 1980.[5] In fact, as noted in footnote 3, *infra*, the railroads have recently done this. Until the Commission allows the filing of a higher rate, however, or this Court clarifies its decision, the Commission believes that the railroads are without legal authority to demand prepayment of any rate higher than *San Antonio I*.[6]

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[5] Under the Staggers Act, the Commission may now protect carriers and shippers equally during the pendency of a Commission investigation, since the Commission may order further payments to carriers, plus interest, if it suspends a rate and later finds it to be justified. 49 U.S.C. 10707 (d)(2). Thus the railroads' claim that they cannot be made whole (Petition 11) is no longer true as to future rates.

[6] The Commission's November 14, 1980, decision to suspend the prepayment tariff supplement is not appealable. The Supreme Court recently found it "absolutely clear" that Congress intended to commit the use of the suspension and investigation power to the "unfettered discretion of the Commission." *Southern Railway Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 460-61 (1979). That case, moreover, is merely the most recent of a long line of cases establishing that Commission determinations on whether to investigate or suspend tariff proposals are not reviewable. *Aberdeen & Rockfish* v. *SCRAP*, 422 U.S. 289, 311 (1975); *Arrow Transportation Co.* v. *Southern Ry Co.*, 372 U.S.

CONCLUSION

For the above reasons, the Commission asks the Court to clarify its June 9, 1980 decision as indicated above.

Respectfully submitted,

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Opposition

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Office - Supreme Court, U.S.
FILED
FEB 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1008

In the Supreme Court of the United States

OCTOBER TERM, 1981

BURLINGTON NORTHERN, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

The Interstate Commerce Commission, in successive decisions, set maximum reasonable rates on a railroad coal movement of $11 in 1976, $16 in 1978, and $17 in 1979. The question presented in this case is whether, consistent with this Court's decisions forbidding judicial ratemaking, the court of appeals may reinstate or revive the first of those rate decisions by vacating and remanding the latter two decisions as inadequately explained.*

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* A list of the parties in the court of appeals is set out in the Brief of Respondent, San Antonio, Texas, page ii.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement:	
A. The Commission's San Antonio rate cases	2
B. The court of appeals' remand decision	3
C. The challenged decision	6
Discussion	7
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Arizona Grocery Co. v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 8
Arkansas Louisiana Gas Co. v. *Hall*, No. 78-1789 (July 2, 1981) 15
Atchison, T. & S.F. Ry. v. *Wichita Board of Trade*, 412 U.S. 800 ..... 5, 6, 8, 9, 10, 11, 15
Atlantic Coast Line R.R. v. *Florida*, 295 U.S. 301 .. 11, 12, 13
Burlington Northern, Inc. v. *United States*, 555 F.2d 637 2
Consolidated Rail Corp. v. *National Association of Recycling Industries, Inc.*, 449 U.S. 609 .. 5, 6, 8, 9, 10, 15
Florida v. *United States*, 282 U.S. 194 12
Lowden v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 15
San Antonio v. *Burlington Northern, Inc.*, 650 F.2d 49, clarified, 652 F.2d 422 ..... 6, 14
United States v. *Morgan*, 307 U.S. 183 12

Statutes: Page

Interstate Commerce Act, 49 U.S.C. (Supp. III) 10101 *et seq.*:
49 U.S.C. (Supp. III) 10704(a)(1) 2
49 U.S.C. (Supp. III) 10761 3
Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31..... 10
Staggers Rail Act of 1980, Pub. No. 96-448, 94 Stat. 1895 10

In the Supreme Court of the United States

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No. 81-1008

BURLINGTON NORTHERN, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A) is reported at 655 F.2d 1341. An earlier related decision of the court of appeals (Pet. App. B), not challenged here, is reported at 631 F.2d 831. The decision of the Interstate Commerce Commission (Pet. App. F) is reported at 364 I.C.C. 887. The three rate decisions of the Commission (Pet. Apps. E, C, and D) are reported at 355 I.C.C. 405, 359 I.C.C. 1, and 361 I.C.C. 482, respectively.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1981. A petition for rehearing was denied

on August 26, 1981 (Pet. App. G). The petition for a writ of certiorari was filed on November 24, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. The Commission's San Antonio Rate Cases

In 1976 the City of San Antonio, Texas, filed a complaint with the Interstate Commerce Commission, asking the Commission to exercise its authority under 49 U.S.C. (Supp. III) 10704(a)(1) to prescribe a reasonable railroad rate on transportation of coal from Wyoming to San Antonio's newly constructed coal-fired electric generating facilities at Elmendorf, Texas. In its decision on that complaint, now known as *San Antonio I* (Pet. App. E), the Commission prescribed a rate of $10.93 per ton and ordered the carriers to maintain a tariff at a rate not exceeding that level "until the further order of the Commission" (*id.* at E-14). The Commission noted that its prescription was an interim measure necessary in order to get the coal moving at once, but that, as actual experience was acquired, the parties could petition for modification of the prescription (*id.* at E-13 to E-14). The United States Court of Appeals for the Eighth Circuit affirmed the Commission's order, emphasizing that the "rate is a temporary one, developed to meet an emergency situation" and could "be modified on application to the Commission." *Burlington Northern, Inc.* v. *United States*, 555 F.2d 637, 648 (1977).

In 1977, the railroads applied for reopening of the Commission proceeding. After taking new evidence, the Commission issued its second decision, *San Antonio II* (Pet. App. D). The Commission found that a higher rate of $16.12 per ton would be lawful and modified its *San Antonio I* maximum rate prescrip-

tion accordingly (*id.* at D-18). Following the filing of various administrative appeals, the Commission issued its third rate decision, *San Antonio III* (Pet. App. C), increasing the *San Antonio II* prescription to $17.23 per ton (*id.* at C-17).

B. The Court of Appeals' Remand Decision

Petitions for review of the *San Antonio II* rate prescription as modified in *San Antonio III* were filed in the United States Court of Appeals for the District of Columbia Circuit by both San Antonio and the railroads. San Antonio and its supporting parties argued that the rate was too high. The railroads and their supporters argued that the rate was too low. Without expressing any opinion as to whether the Commission's maximum rate prescription was too high or too low, the court of appeals vacated the Commission's *San Antonio II* and *III* decisions and remanded the case to the Commission (Pet. App. B), holding that the *San Antonio II* and *III* decisions were "arbitrary and capricious" and without "defensible rationale" (*id* at B-39). In so holding, however, the court did not address that portion of the Commission's *San Antonio II* decision that had modified the specific rate prescribed in *San Antonio I*, thus permitting the railroads to file rate tariffs above that amount.

At the time of the court of appeals' decision (June 9, 1980), the railroad tariff on file with the Commission [1] set rates at the maximum level permitted by the

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[1] The Interstate Commerce Act (49 U.S.C. (Supp. III) 10761) provides that railroads subject to the Commission's jurisdiction can only provide transportation service "if the rate for the transportation or service is contained in a tariff that is in effect * * *." In addition, the carrier "may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff * * *."

Commission's *San Antonio III* decision. Although that tariff remained on file with the Commission, San Antonio unilaterally began reducing its payments to the *San Antonio I* level.

It was at that point that the controversy now before this Court began. From July 1980 through May 1981, San Antonio paid the railroads at the *San Antonio I* level rather than at the higher tariff level, on the theory that that court of appeals had revived the Commission's 1976 *San Antonio I* prescription by vacating the *San Antonio II* and *III* decisions. San Antonio did not resume paying the tariff rate until after the Commission issued a decision (Pet. App. F) vacating the *San Antonio I* rate (to the extent that it may have been revived by the court of appeals) and ordering San Antonio to pay the tariff rate.[2]

In their first attempt to enforce payment of the tariff rate, the railroads, in October 1980, filed a new tariff that would have required San Antonio to pre-pay the tariff rate before coal service would be provided. A division of the Commission suspended that pre-payment tariff, stating its belief that the court of appeals' decision had rendered the earlier *San Antonio I* prescription effective, but it invited the railroads to file a new rate tariff and have the *San Antonio I* prescription lifted (see Pet. App. F-3).

Shortly thereafter, on November 22, 1980, the railroads filed a petition for clarification of the court of appeals' mandate, requesting the court to make clear that its decision did not suspend the effectiveness of the tariff rates on file with the Commission or require a rate rollback to the *San Antonio I* level pending

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[2] Petitioners state (Pet. 8) that the difference between the tariff rate and the amounts paid by San Antonio during the period between July 1980 and May 1981 is $19,887,180.

further proceedings before the Commission (see Pet. App. F-3). The railroads relied on the plurality decision in *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 817-826 (1973), for the proposition that the court of appeals could not, in remanding the Commission's rate decisions, also establish rates in the interim. San Antonio opposed the petition, arguing that when the court of appeals set aside the Commission decisions in *San Antonio II* and *III*, the *San Antonio I* rate governed because there was no valid order of the Commission permitting a higher rate (see Pet. App. F-3).

The Commission initially took the position that, in the absence of a clarification to the contrary, restoration of the *San Antonio I* rate was a necessary consequence of the court of appeals' remand decision. The Commission pointed out, however, that such a result would be inequitable to the railroads because the rate prescription was years out of date and, moreover, would deprive the railroads of revenue that could not be regained because the Commission is without power to order shippers to pay higher rates retrospectively. The Commission urged the court of appeals to rule that its decision did not have that effect (see Pet. App. F-3 to F-4).

Subsequently, the Commission changed its position on the question whether the court of appeals' remand decision necessarily revived the *San Antonio I* prescription (Pet. App. F.). The Commission concluded that this Court's decisions in *Consolidated Rail Corp.* v. *National Association of Recycling Industries, Inc.*, 449 U.S. 609 (1981),[3] and *Atchison, T. & S.F. Ry.* v.

[3] This Court's *Consolidated Rail* decision was issued after the Commission and the other parties had filed their initial responses to the railroads' petition for clarification in the court of appeals.

Wichita Board of Trade, supra, were controlling and should lead the court of appeals to clarify its mandate as having not restored the *San Antonio I* rate (Pet. App. F-6 n.3).[4]

C. The Challenged Decision

In the decision under review (Pet. App. A), the court of appeals acknowledged that this Court, in *Consolidated Rail* and *Wichita Board of Trade*, had held that the courts are barred from determining interim transportation policy or rates pending further action by the Commission following a judicial remand order (Pet. App. A-3 to A-5). In light of those decisions, the court analyzed its role as merely restoring the status quo ante, without taking affirmative action on its own to set interim policy. Despite the fact that the Commission had significantly modified the *San Antonio I* prescription in 1978 and 1979 and took the position that it would be inequitable to revive it, the court held that with the *San Antonio II* and *III* orders vacated, "*San Antonio I* did continue in force pending further ICC action" (*id.* at A-3). The court concluded (*id.* at A-6):

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[4] While the railroads' petition for clarification was pending before the D.C. Circuit, the Commission issued a decision permitting a railroad rate tariff in excess of the *San Antonio I* level to go into effect (see Pet. App. F-4 to F-5). However, San Antonio continued to pay at the *San Antonio I* rate level, in part under color of an injunction issued by the United States District Court for the Western District of Texas (see *id* at F-5). After the United States Court of Appeals for the Fifth Circuit vacated the preliminary injunction and refused to stay the Commission's decision (*San Antonio* v. *Burlington Northern, Inc.*, 650 F.2d 49, clarified, 652 F.2d 422 (1981)), San Antonio began to pay the full tariff rate.

> Because the vacation of those orders revived the ICC's own *San Antonio I* order, our decision has had the practical effect of rendering unlawful the railroads' tariffs filed under the umbrella of the vacated *San Antonio II* and *III* orders.

Under this analysis, the court disclaimed responsibility for reviving the *San Antonio I* rate, stating that result was the consequence of the Commission's pre-existing *San Antonio I* order (*id.* at A-5 n.12). The court suggested that it had no choice in the matter because the *San Antonio I* order was not before it and thus could not be struck down (*id.* at A-6).

DISCUSSION

The court of appeals in this case has revived an outdated ICC rate prescription and declared that rate tariffs in excess of that prescription are unlawful. In so doing, it has interpreted an order of the Commission without first giving the Commission an opportunity to interpret its own order. In addition, the decision below produces a result that is patently inequitable to the railroads. The effect of the court's decision is to preclude the railroads from ever collecting rates in excess of the "revived" maximum rate level for the period in which that prescription was "revived," even if the Commission ultimately should determine that the railroads were entitled to charge a substantially higher rate.[5]

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[5] Although the Commission disagreed with the court of appeals' decision that the *San Antonio I* prescription had been revived, the Commission did not file a petition for certiorari to review that decision. The Commission originally believed that the decision below could reasonably be construed as merely declaring the railroads' tariffs unlawful until such time as the Commission, in the remanded proceeding, should

Moreover, the court of appeals' decision is contrary to this Court's decisions in *Consolidated Rail Corp.* v. *National Association of Recycling Industries, Inc.*, 449 U.S. 609 (1981), and *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973), because it places the court in the position of establishing a rate level that the Commission has found to be unsupported by current cost data or current legal standards. The decision thus constitutes a judicial intrusion on the Commission's jurisdiction under the Interstate Commerce Act. By creating the possibility that, whenever a Commission rate decision is set aside for whatever reason, a prior prescription made years before in a substantially different economic and legal environment may be revived, the decision below im-

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determine that the railroads were entitled to a rate in excess of the *San Antonio I* level for the relevant period. Under such a construction, if the Commission ultimately were to determine that the maximum rate for the period between July 1980 and May 1981 exceeded the *San Antonio I* level, then San Antonio would be obligated to remit the difference to the railroads.

After further reflection, we do not now believe that the court of appeals' holding can be so construed. In *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 387-390 (1932), this Court held that if the Commission prescribes a specific rate that the carrier believes is too low, the carrier has no recourse other than requesting a new hearing and prescription of a higher rate for the future; the carrier may not collect reparations for past rates found to have been unreasonably low. Thus, under *Arizona Grocery*, the practical effect of the court of appeals' holding reviving the *San Antonio I* rate is to freeze that rate for the period during which it was revived, and to prevent any retroactive recovery to the railroads from San Antonio, regardless of any subsequent Commission findings as to the reasonableness of that rate level.

pedes the Commission's performance of the ratemaking responsibilities entrusted to it by Congress.

1. *a.* We agree with petitioners that the court of appeals' decision conflicts with this Court's decisions in *Consolidated Rail* and *Wichita Board of Trade.*

In *Consolidated Rail*, the D.C. Circuit had remanded a Commission decision for failure to adequately justify a rate standard and had revoked all railroad rate increases filed under that standard and enjoined further increases. This Court reversed summarily, holding that "[t]he authority to determine when any particular rate should be implemented is a matter which Congress has placed squarely in the hands of the Commission." 449 U.S. at 612. Thus, although the court of appeals was empowered to remand for further proceedings on the propriety of the rate standard, "the court stepped beyond the proper exercise of its power when it revoked rates implemented under the standard * * *." *Ibid.*

Likewise, in *Wichita Board of Trade*, this Court reversed a decision by a three-judge district court enjoining rail rate increases that had been filed pursuant to a remanded ICC rate standard. The plurality concluded that "[w]hen a case is remanded on the ground that the agency's policies are unclear, an injunction ordinarily interferes with the primary jurisdiction of the Commission." 412 U.S. at 822.

Thus, as the court below acknowledged (Pet. App. A-4), "the Supreme Court has made it crystal clear that [the courts of appeals] are without authority to determine interim transportation policy pending further ICC action after a decision * * * vacating an ICC order." The decision below, however, is inconsistent with this acknowledgement. The Commission, in its decision vacating the *San Antonio I* prescription

(Pet. App. F) made clear its view as to the proper "interim transportation policy." It concluded that the railroads should not be restricted to the outdated *San Antonio I* rate level, which it found to be unsupported by either current cost data or legal standards (*id.* at F-7 to F-8).[6] Thus, the Commission ordered San Antonio to pay the existing tariff rate subject to reparations if the Commission ultimately determines that rate to be in excess of a reasonable maximum (*id.* at F-8, F-11).

By holding that its decision vacating *San Antonio II* and *III* had the effect of reinstating *San Antonio I* as the maximum rate prescription, the court of appeals in effect imposed a rate policy different from that established by the Commission. The court nevertheless sought to avoid the application of *Consolidated Rail* and *Wichita Board of Trade* by asserting (Pet. App. A-5 n.12) that the Commission, not the court, was responsible for the revival of *San Antonio I*. This analysis rests on the faulty premise that "*San An-*

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[6] The same considerations that led the Commission to conclude that the *San Antonio I* rate prescription had no continuing validity as of April 1981, are equally applicable to the period during 1980 and 1981 that is directly at issue here. For example, the Commission, in prescribing the *San Antonio I* rate in 1976, did not have occasion to consider two major, subsequently enacted amendments to the Interstate Commerce Act, the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, and the Staggers Rail Act of 1980, Pub. L. No. 95-448, 94 Stat. 1895. Both statutes contain provisions directly relevant to the Commission's ratemaking responsibilities in cases such as the *San Antonio* case. The Commission found that the fact that ratemaking criteria in the new legislation were not considered in arriving at its *San Antonio I* prescription in 1976 was a more than adequate basis for declaring the rate invalid in 1981 (see Pet. App. F-8).

tonio I did continue in force pending further ICC action" and that "[t]ariffs in excess of it have been therefore unlawful" (Pet. App. A-3).

As the court of appeals itself recognized (Pet. App. A-5, quoting *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade, supra*, 412 U.S. at 818-819; footnote omitted; emphasis added by the court of appeals):

> The only consequence of suspending [a Commission rate order] is that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable. In an action for reparations, for example, the railroads could not gain any benefit from the purported Commission approval of the increases. * * *
>
> *Carriers may put into effect any rate that the Commission has not declared unreasonable.* Suspension of the Commission's order thus does not in itself preclude the carriers from implementing a new rate.

Despite the holding of *Wichita Board of Trade* concerning the limited consequences of setting aside a Commission rate decision, the court below held that an earlier Commission rate order had been revived and the court declared railroad tariffs in excess of that earlier rate order to be unlawful. The effect is precisely the same as if the court had directly enjoined railroad rates in excess of the *San Antonio I* level following its remand decision.[7]

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[7] San Antonio's reliance (Br. 6-7) upon this Court's decision in *Atlantic Coast Line R.R.* v. *Florida*, 295 U.S. 301 (1935), is misplaced. In *Atlantic Coast Line*, the Florida Railroad Commission had prescribed maximum rates for log movements within Florida. The Interstate Commerce Com-

b. Furthermore, the court of appeals did not confront what the Commission pointed out (Pet. App.

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mission found those rates to be unlawfully low and prescribed higher rates which the railroads then charged. Before the ICC's order became effective, the Florida Commission issued a new order, providing that its prior order would be suspended "so long as federal Commission's order should remain in force." 295 U.S. at 323 (Roberts, J., dissenting). The ICC's order was later reversed by this Court. *Florida* v. *United States*, 282 U.S. 194 (1931). Subsequently, on new evidence and findings conforming to this Court's earlier opinion, the Commission issued an order setting the maximum rates at the same level as before.

The sole issue addressed by the Court in *Atlantic Coast Line* was whether the shippers were entitled to restitution for charges collected by the carriers under color of the original Commission rate order that had been reversed for inadequate findings—that is, the difference between the ICC's rate order and the Florida Railroad Commission's rate order. The Court held that the shippers were not entitled to restitution because "[w]hat was injustice at the date of the second order of the Commission [*i.e.*, the unreasonably low rates prescribed by the Florida Railroad Commission] is shown beyond a doubt to have been injustice also at the first." 295 U.S. at 316. See *United States* v. *Morgan*, 307 U.S. 183, 195-196 (1939).

The Court in *Atlantic Coast Line* did *not* address the issue whether the Florida Railroad Commission rate prescription necessarily had been restored when the ICC's first order was set aside. In dissent, Justice Roberts observed in passing that once the ICC's original order had been struck down, the prior prescription of the Florida Commission governed the rail movements in question. 295 U.S. at 324. But unlike *San Antonio I*, which provided that it would *remain effective* only "until the further order of the Commission" (Pet. App. E-14), the Florida Commission's prescription in *Atlantic Coast Line* was *suspended* for only so long as the ICC's order "should remain in force." 295 U.S. at 323 (Roberts, J., dissenting). Thus, *San Antonio I* was, by its terms, an interim prescription whereas the Florida Commission order was expressly made subject to revival upon the setting aside of the super-

F-8) as the basic dilemma in this case: *viz.*, that the railroads could be irreparably harmed through reinstatement of the *San Antonio I* prescription but that because of the Commission's power to award reparations, San Antonio's position would be protected if it were required to pay the higher tariff rate. The inequitable result of the court's action could easily have been avoided, as petitioners suggest (Pet. 15-16), by reading the court's earlier decision as having vacated the Commission's *San Antonio II* and *III* decisions only "in part," thus leaving intact that part of the Commission's 1978 *San Antonio II* decision—not directly challenged by the parties or addressed by the court of appeals—that had modified the *San Antonio I* prescription.

Alternatively, the court below should have remanded to the Commission to construe its own order. The *San Antonio I* order provided, in relevant part, that "this order shall continue in full force and effect until the further order of the Commission" (Pet. App. E-14). In light of subsequent events, including the modification of *San Antonio I* by the Commission's *San Antonio II* and *III* orders and the subsequent court of appeals decision vacating the latter two Commission orders, it is at the very least unclear whether the Commission intended its 1976 *San Antonio I* order to "continue in full force and effect" in July 1980, when the D.C. Circuit's mandate took effect. The Commission should have been permitted to clarify this ambiguity; instead, the court below summarily con-

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seding ICC order. Because the Commission order at issue here differs substantially in its terms from the Florida Commission order in *Atlantic Coast Line*, San Antonio can draw no support from Justice Roberts' dissent in that case.

cluded (Pet. App. A-3; emphasis added) that "*San Antonio I did* continue in force." [8]

If the court of appeals had followed either of these alternative courses, the practical effect would have been that the railroads could continue to collect the rates reflected in their tariffs subject, of course, to reparations if the Commission were later to determine that those rates were excessive.

c. We also agree with petitioners that the decision below reflects a fundamental disagreement with the decision of the Fifth Circuit in *San Antonio* v. *Burlington Northern, Inc.*, 650 F.2d 49, clarified, 652 F.2d 422 (1981), concerning the proper role of the courts in the ICC ratemaking system. In the latter case, which involved the same basic dispute underlying the instant case, the Fifth Circuit addressed the validity of a district court injunction barring the railroads from collecting the rate set forth in a tariff that the Commission had permitted to take effect. Although the district court purported to enforce the Commission's *San Antonio I* order through its injunction, the Fifth Circuit found that the Commission had not made a final determination that the published tariff rate was unlawful. In vacating the district court's injunction, the Fifth Circuit held (650 F.2d at 53; footnote omitted):

> When the Commission has not made a final determination, in a matter of which it has jurisdiction, that a published rate is unlawful (whether because the rate violates a prior Commission

[8] The court of appeals inconsistently concluded, on the one hand (Pet. App. A-6), that because the *San Antonio I* order was not before it on review, the court could not have stricken it, and on the other hand, that it could construe that same 1976 order to give it revived force and effect.

order or for any other reason), only the Commission can suspend the rate.

Here, of course, the court of appeals has not suspended any rate directly. Nevertheless, it has accomplished the same result by declaring tariffs in excess of the *San Antonio I* rate unlawful for the period between July 1980 and May 1981, despite the fact that the Commission has never determined that such rates are unlawful.

2. Because the court of appeals' holding is plainly inconsistent with this Court's approach in *Consolidated Rail* and *Wichita Board of Trade*, there is no need for the Court to address the question whether the decision below is also contrary to the "filed rate doctrine," which requires regulated carriers to collect, and shippers to pay, only the rate set forth in the tariff on file with the Commission. See *Arkansas Louisiana Gas Co.* v. *Hall*, No. 78-1789 (July 2, 1981); *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520-521 (1939). Nonetheless, we agree with petitioners (Pet. 18-21) that San Antonio was obligated to pay the tariff rate rather than the lower *San Antonio I* rate during the relevant period. To the extent that the court of appeals' decision can be read as sanctioning San Antonio's resort to self help during this period, that decision cannot be squared with the long line of decisions of this Court requiring adherence to published tariffs.

3. Finally, we agree with petitioners (Pet. 21-24) that the decision below undermines the ratemaking scheme established under the Interstate Commerce Act by requiring a rate rollback whenever a reviewing court sets aside a Commission rate order modifying a prior rate order. The court of appeals' holding

would present no particular problem if, immediately upon remand of a Commission rate decision, the Commission could vacate summarily any prior rate prescription that might have been revived if, as here, that prescription had no validity under then current circumstances. But, as this case demonstrates, it may not be open to the Commission to act summarily in such a situation because the question remains whether a "full hearing" is required in order to vacate a prescription, as is the case when the Commission is prescribing a new rate (Pet. App. F-8 to F-10). Here, it was obvious to the Commission that the 1976 *San Antonio I* prescription had no continuing validity in 1981 in light of current cost data and legal standards (*id.* at F-7 to F-8). Yet, even after the Commission issued a lengthy opinion analyzing the current validity of the *San Antonio I* rate and ordering the prescription vacated, San Antonio nevertheless argued, on review in the Fifth Circuit, that the Commission's decision should be set aside for failure to accord San Antonio due process. That due process issue has not been finally resolved.[9]

The Commission currently has numerous other rate cases before it or awaiting judicial review. Unless the decision below is reversed, the Commission faces the prospect of similar, needless complications in each of these cases.

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[9] The Fifth Circuit held that the Commission's decision vacating *San Antonio I* was nonfinal and unreviewable; accordingly, the court did not pass upon San Antonio's due process argument. *San Antonio* v. *Burlington Northern, Inc.*, *supra*, 652 F.2d at 423.

CONCLUSION

The petition for a writ of certiorari should be granted.[10]

Respectfully submitted.

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FEBRUARY 1982

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[10] The Court may wish to consider summary reversal and a remand to the court of appeals for further proceedings consistent with the principles discussed on pages 12-14, *supra*.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 386155 790

Opposition

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Office - Supreme Court, U.S.
FILED
JAN 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1008

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BURLINGTON NORTHERN INC. and
SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition For a Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

BRIEF OF RESPONDENT SAN ANTONIO, TEXAS IN OPPOSITION

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Dated: January 27, 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

This case presents an extremely narrow procedural question. In 1976 the Interstate Commerce Commission issued an order prescribing a maximum reasonable railroad rate for coal transportation to San Antonio, Texas. In 1978 and 1979 the Commission issued two (2) more orders, modifying the 1976 order and authorizing higher rates.

On June 9, 1980, the lower court vacated the two (2) modifying orders as erroneous in numerous respects. Thereafter the railroads — Petitioners herein — asked the lower court to "clarify its mandate" by deciding whether its vacation of the two (2) modifying orders had the effect of reinstating the original 1976 rate prescription order.

On June 30, 1981, the lower court answered the question posed by the railroads, holding that its vacation of the 1978 and 1979 modifying orders left the 1976 ICC order, as the last prior valid order of the Commission, in full force and effect.

The question presented is whether this Court should grant certiorari to determine whether the United States Court of Appeals for the District of Columbia Circuit unlawfully interfered with the jurisdiction of the ICC by ruling that its 1976 rate prescription was reinstated by vacation of the subsequent modifying orders.

PARTIES TO THE REVIEW PROCEEDING IN THE COURT OF APPEALS

The proceeding below involved three consolidated petitions for review: No. 78-2051, *San Antonio, Texas* v. *United States*, No. 78-2216, *State of Texas* v. *United States*, and No. 78-2307, *Burlington Northern, Inc.* v. *United States*.* The parties to this review proceeding were:

San Antonio, Texas Acting By And Through Its City Public Service Board**

The State of Texas

The United States of America

The Interstate Commerce Commission

Burlington Northern Inc.

Colorado & Southern Railway Company

Fort Worth & Denver Railway Company

Southern Pacific Transportation Company

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*The Department of Energy also filed, and subsequently voluntarily withdrew, a related petition for review.

**While not named by Petitioners, San Antonio is obviously a party-respondent before the Court. *See* Supreme Court Rule 19.6.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	
I. THE DECISION OF THE COURT BELOW WAS PLAINLY CORRECT	6
II. THE PETITION PRESENTS NO IMPORTANT QUESTIONS	9
A. Introduction	9
B. No Conflict Exists Between The Decision Of The Lower Court And This Court's Conrail Decision	11
C. No Conflict Exists With The Decision Of The Fifth Circuit	13
D. No Conflict Exists With The Filed Rate Doctrine	14
E. The Decision Below Respects Rather Than Undermines The Ratemaking Scheme	15
CONCLUSION	17

TABLE OF AUTHORITIES

CASES: Page

Arizona Grocery Co. v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932) 8, 15

Arkansas Louisiana Gas Co. v. *Hall*, ____ U.S. ____, 101 S.Ct. 2925 (1981) 14

Armour & Co. v. *Louisville Southern Ry.*, 190 F.2d 925 (5th Cir. 1951), *cert. denied*, 342 U.S. 913 (1952) 15

Atchison, T. & S.F. Ry. v. *Wichita Board of Trade*, 412 U.S. 800 (1973) 12

Atlantic Coast Line R.R. v. *State of Florida*, 295 U.S. 301 (1935) 6, 7, 16

Celanese Chemical Co. v. *United States*, 632 F.2d 568 (5th Cir. 1980) 4, 16

Central Power & Light Co. v. *United States*, 634 F.2d 137 (5th Cir. 1980), *cert. denied*, 102 S.Ct. 27 (1981) 4

Cleveland Cliffs Iron Co. v. *I.C.C.*, No. 79-3775 (6th Cir., November 20, 1981) (Slip Op.) 4, 10

Consolidated Rail Corp. v. *National Ass'n of Recycling Industries, Inc.*, ____ U.S. ____, 101 S.Ct. 775 (1981) .. 11, 12

Docket No. 37135, *Increased Rates On Coal, BN, Montana To Superior, Wisconsin*, 362 I.C.C. 625 (1980) 10

Docket No. 36980, *Southwestern Electric Power Co.* v. *Burlington Northern, Inc.*, (Decision served February 4, 1981) (unprinted) 10

F.T.C. v. *Minneapolis-Honeywell Co.*, 344 U.S. 200 (1952) 14

Foreston Coal International, et al. v. *Baltimore & Ohio R.R.*, 349 I.C.C. 495 (1975), *aff'd sub. nom. Island Creek Coal Sales Co.* v. *I.C.C.*, 561 F.2d 1219 (6th Cir. 1977) .. 15

Greene v. *United States*, 376 U.S. 149 (1964) 7

I&S No. 9199, *Unit Train Rates on Coal—Burlington Northern, Inc.*, (Decision served October 1, 1980) (unprinted) 10

Iowa Power & Light Co. v. *Burlington Northern, Inc.*, 647 F.2d 796 (8th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3570 (1982) 4, 10

Iowa Public Service Co. v. *I.C.C.*, 643 F.2d 542 (8th Cir. 1981) 4

Table of Authorities Continued

Page

Nashville Traffic Bureau v. *Louisville & Nashville R.R.*, 53 I.C.C. 37 (1919) 15

Union Pacific R.R. v. *United States*, 637 F.2d 764 (10th Cir. 1981) 4

STATUTES AND RULES:

Revised Interstate Commerce Act, Title 49, United States Code 49 U.S.C. §10704(a)(1) 2, 7, 12

Supreme Court Rules, Title 28, United States Code
Rule 17 ..... 11, 13
Rule 19.6 ii
Rule 20 14

IN THE

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BURLINGTON NORTHERN INC. and
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UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition For a Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

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BRIEF OF RESPONDENT SAN ANTONIO, TEXAS IN OPPOSITION

Respondent San Antonio, Texas, acting by and through its City Public Service Board ("San Antonio") opposes the request by Petitioners Burlington Northern Inc. and Southern Pacific Transportation Company ("the railroads" or "the carriers") asking this Court to issue a Writ of Certiorari to the U.S. Court of Appeals for the D.C. Circuit, and files this brief in support of its position of opposition.

STATEMENT OF THE CASE

No competition exists for the unit coal train transportation services provided by the Petitioner railroads to haul the coal which San Antonio, Texas requires to operate its electric gen-

eration facilities. As a direct consequence of this transportation monopoly, San Antonio has been forced to wage a long and continuing struggle to overcome Petitioners' fundamentally unfair rail pricing practices, which have included "bait and switch tactics"[1] and other abusive coal transportation pricing maneuvers. San Antonio's struggle to obtain just and reasonable freight rates began when the Petitioners failed to offer a reasonable freight rate voluntarily. Left with no other option, San Antonio initiated a proceeding before the Interstate Commerce Commission ("ICC" or "Commission") in May of 1975 seeking a rate prescription under what is now § 10704(a)(1) of the Revised Interstate Commerce Act ("Act"). In October of 1976, the ICC issued an order in that proceeding prescribing a freight rate for San Antonio's coal traffic. Since the Commission's decision in that case, which preceded the commencement of San Antonio's coal movements in 1976, San Antonio has shipped its coals exclusively under freight rates prescribed by the ICC. From the very beginning, the rate as set by the ICC has pleased no one in the sense that it has always been well below the rate sought by the railroads and well above the level which San Antonio believes to be reasonable.[2] The rate prescribed by the ICC in 1976 was upheld upon challenge by the railroads in *Burlington Northern, Inc.* v. *United States*, 555 F.2d 637 (8th Cir. 1977).

Some two and one-half (2-1/2) months after the decision of the Eighth Circuit upholding the *San Antonio I* order, the

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[1] *San Antonio, Texas* v. *Burlington Northern, Inc.*, 359 I.C.C. 1, 8 (1977) (*"San Antonio II"*) (App. D-8), *vacated on other grounds sub nom. San Antonio, Texas* v. *United States*, 631 F.2d 831 (D.C. Cir. 1980) (App. B).

[2] The rate of $10.16 per ton as first prescribed in *San Antonio, Texas* v. *Burlington Northern, Inc.*, 355 I.C.C. 405 (1976)(*"San Antonio I"*)(App. E) *aff'd sub nom. Burlington Northern, Inc.* v. *United States*, 555 F.2d 637 (8th Cir. 1977) was about midway between the $12.30 urged by the railroads and the $9.00 sought by San Antonio.

railroads petitioned the ICC to reopen the rate proceeding for the receipt of additional evidence, and to consider modification of the prescribed rate.[3] In this reopened proceeding, the railroads sought a new rate to San Antonio that was not only higher than the maximum rate they were permitted to charge by the ICC's outstanding order, but was even higher than the price they had sought in the beginning and which the ICC had rejected. San Antonio vigorously opposed the increase sought by the railroads.

Following another lengthy hearing, the ICC issued a decision and order through which it *modified* its outstanding San Antonio rate order by prescribing a higher rate.[4] This new rate prescription was further modified and increased seven (7) months later upon reconsideration by the Commission.[5] Numerous parties, including both the railroads and San Antonio, sought judicial review of the Commission's new rate prescriptions.

In its presentation to the lower court, San Antonio averred that numerous ICC errors resulted in a grossly excessive rate prescription. Because the assailed orders were requiring its

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[3] The railroads are fond of emphasizing the fact that in a certain narrow respect, the *San Antonio I* order was a temporary one. Because this insignificant aspect of the *San Antonio I* order has been blown completely out of proportion by the carriers in their Petition, an explanation is in order. Because no trains were moving when the ICC first prescribed the rate to San Antonio, the Commission invited the parties to seek future modifications which might subsequently be appropriate on the basis of actual train operations. *San Antonio I, supra*, 355 I.C.C. at 417-18 (App. E-13-14). In this very limited respect, the prescription was temporary. The carriers, however, seek to imply from this "temporary" aspect of the initial prescription process that the rate prescribed was too low. No such implication can be drawn.

[4] *San Antonio II, supra*, 359 I.C.C. at 20 (App. D-20).

[5] *San Antonio, Texas* v. *Burlington Northern, Inc.*, 361 I.C.C. 482 (App. C), *("San Antonio III"), vacated sub nom. San Antonio, Texas* v. *United States*, 631 F.2d 831 (D.C. Cir. 1980)(App. B).

electric customers to pay excessive rates, San Antonio asked the court to *vacate* the ICC's orders so as to "reinstate the rate level prescribed in *San Antonio I*."[6] On June 9, 1980, the lower court found that the assailed orders were arbitrary and capricious in several critical respects.[7] The court *vacated* the orders of the ICC as requested by San Antonio and remanded the proceeding to the ICC.[8]

After issuance of the mandate from the D.C. Circuit on July 24, 1980, San Antonio advised the railroads that it could only pay a rate level in conformance with the Commission's *San Antonio I* rate prescription order.[9] Because the orders in *San Antonio II* and *III* modifying the *San Antonio I* rate prescription were vacated, the earlier prescription again controlled the rate level.

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[6] Brief For Petitioner at 51 (Oct. 1, 1979), *San Antonio, Texas* v. *Burlington Northern, Inc.*, 631 F.2d 831 (D.C. Cir. 1980).

[7] *San Antonio, Texas* v. *United States*, 631 F.2d 831 (D.C. Cir. 1980)(App. B.).

[8] The lower court's decision, and particularly its carefully-reasoned analysis of various rate-inflating mistakes made by the ICC, has been followed and adopted repeatedly in other circuits. *See Cleveland Cliffs Iron Co.* v. *ICC*, Slip op. at 22-36, No. 79-3775 (6th Cir., Nov. 20, 1981); *Iowa Power & Light Co.* v. *Burlington Northern, Inc.*, 647 F.2d 796, 810 (8th Cir. 1981), *cert denied, 50 U.S.L.W. 3570* (1982); *Iowa Public Service Co.* v. *ICC*, 643 F.2d 542, 546-48 (8th Cir. 1981); *Union Pacific R.R.* v. *United States*, 637 F.2d 764, 768 (10th Cir. 1981); *Central Power & Light Co.* v. *United States*, 634 F.2d 137, 165 (5th Cir. 1980), *cert denied, 102 S.Ct. 27* (1981); *Celanese Chemical Co., Inc.* v. *United States*, 632 F.2d 568, 575-76 (5th Cir. 1980).

[9] Contrary to the assertions of the railroads in their Petition, the *San Antonio I* rate level was not "outdated" as of July 1980 because, like all prescribed rates, it was subject to a series of Commission orders periodically adjusting rates to offset inflation. The $10.16 rate set in *San Antonio I* in October 1976, as increased by such orders, stood at nearly $16.00 per ton as of July 1980.

Initially, the railroads took no action subsequent to July 24, 1980 other than to send San Antonio balance due invoices for the difference between the *San Antonio III* level rate they were billing and the *San Antonio I* level rate being paid by San Antonio. Several months later, however, the railroads commenced a series of legal maneuvers, including the filing of the Petition for Clarification with the D.C. Circuit which gave rise to the decision the railroads here challenge. Finally, the carriers petitioned the ICC to issue an order modifying the *San Antonio I* rate prescription "to the extent necessary to permit the [*San Antonio III* level] rate to become and remain effective" (letter of January 19, 1981 from Railroad Counsel to the Secretary of the ICC). The ICC granted this request in an order, which became effective on May 7, 1981, authorizing the carriers to post a higher rate subject to subsequent modification after an evidentiary hearing that is now in progress.[10] Thus, the only period affected by the reinstatement of the *San Antonio I* rate prescription is the period from July 24, 1980, the date of the D.C. Circuit's mandate vacating the *San Antonio II* and *III* orders, to May 7, 1981.[11]

Through the instant Petition the railroads request the intervention of this Court to undo the claimed adverse financial impact resulting from their mistaken legal tactics following the D.C. Circuit's decision. Had the railroads properly and promptly secured from the ICC a modification of the *San Antonio I* rate

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[10] *San Antonio, Texas* v. *Burlington Northern, Inc.*, 364 I.C.C. 887 (1981) (App. F).

[11] The railroads state in their Petition that San Antonio has contended that vacation of the orders in *San Antonio II* and *III* entitles San Antonio to reparations back to the date of the *San Antonio II* order, based upon application of the *San Antonio I* rate level. This is untrue. San Antonio has explicitly taken the position in the reopened proceedings now pending at the ICC that the ICC must determine what the maximum reasonable rate level was as of the date of the *San Antonio II* order. If, as San Antonio contends, a proper determination yields a maximum reasonable rate lower than the *San Antonio II* level, then San Antonio will be entitled to reparations.

order, they would not have suffered the supposedly adverse financial consequences which they now claim.[12] Instead, as will be discussed *infra*, the carriers ignored the clear requirements of the statute and relevant precedent. They now seek to minimize the consequences of their errors by laying the blame for their own mistakes on actions which they wrongfully ascribe to the lower court. If a culprit exists, it is the Petitioners' own misguided rate maneuverings and not the D.C. Circuit.

REASONS FOR DENYING THE WRIT

I.
THE DECISION OF THE COURT BELOW WAS PLAINLY CORRECT

The only issue decided by the D.C. Circuit in its June 30th decision was the effect of its earlier decision vacating the orders of the Commission in *San Antonio II* and *III*. The court held that:

> [b]ecause the vacation of those orders revived the ICC's own *San Antonio I* order, our decision has had the practical effect of rendering unlawful the railroads' tariffs filed under the umbrella of the vacated *San Antonio II* and *III* orders.

Id., 655 F.2d at 1344 (App. A-6). This conclusion is clearly correct.

It should be noted that from the very inception of the proceedings before the lower court, San Antonio stressed that if the court vacated the ICC's *San Antonio II* and *III* orders as San Antonio prayed, the effectiveness of the *San Antonio I* order would be restored. This consequence was recognized in *Atlantic Coast Line R.R.* v. *State of Florida*, 295 U.S. 301 (1935) ("*Atlantic Coast Line*"), the only other case dealing with multiple railroad rate orders. The pertinent facts of the *Atlantic Coast*

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[12] As is pointed out, *infra*, there are two (2) sides to whether the *San Antonio I* rate is reasonable.

Line case were that (a) the Railroad Commission of Florida issued an order prescribing certain rail rates; (b) the ICC set aside the Florida Commission's order and, in the same order, prescribed higher rates; (c) the ICC decision was vacated by the Supreme Court; and (d) the effect of setting aside the ICC's order was determined to be reinstatement of the Florida Commission's rate prescription order. After the Supreme Court's decision vacating the ICC's order and remanding to the Commission, the railroads involved moved the Supreme Court for an order permitting the ICC-prescribed rates to stay in effect during the proceedings on remand. This motion for stay was denied by the Court for reasons explained as follows:

> The Coast Line, taking the position that further action by the Interstate Commerce Commission might in some way cure the defect in its order, moved us to stay our mandate of reversal to the District Court, or, in the alternative, that we include in the mandate a direction to that court to maintain the status quo until the Commission should have opportunity to reopen its proceedings and properly determine the matter. *We denied the motion, for the obvious reason that neither we nor the court below could authorize the railroad to persist in charging rates which had been fixed by a void order. Upon the going down of our mandate, the District Court entered it as its decree in the cause; and the Coast Line, as it was bound to do, immediately reduced its rates to the level* [prescribed by the Railroad Commission of Florida].

Id., 295 U.S. at 324 (emphasis added) (opinion of Roberts, J., joined by Brandeis & Stone, JJ. concurring in part and dissenting in part); *cf. Greene* v. *United States*, 376 U.S. 149, 161 (1964).

The Act itself provides that:

> When a rate . . . is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate. . . .

49 U.S.C. § 10704(a)(1). The Supreme Court has explained

the effect of the law governing rate prescriptions in *Arizona Grocery Co.* v. *Atchison, T.&S.F. Ry.*:

> Specific rates prescribed for the future take the place of the legal tariff rates theretofore in force by the voluntary action of the carriers, and themselves become the legal rate. As to such rates, there is therefore no difference between the legal or published tariff rate and the lawful rate. *The carrier cannot change a rate so prescribed and take its chances of an adjudication that the substituted rate will be found reasonable. It is bound to conform to the order of the Commission. If that body sets too low a rate, the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future.*

Id., 284 U.S. 370, 387-88 (1932) (emphasis added) ("*Arizona Grocery*").

As *Arizona Grocery* makes perfectly clear, if the railroads believed that the *San Antonio I* rate level was too low, the appropriate remedy was to ask the ICC to change it. Eventually, they did just that and the Commission granted their request.

Although the carriers assert that the results of the reinstatement of the *San Antonio I* rate prescription are harsh, there is no basis for surprise or doubt as to the practical consequences of the lower court's order. Even if the railroads gave no thought to the relevant legal precedents, as earlier noted, San Antonio expressly spelled out in its prayer for relief that the effect of vacating the later ICC orders would be to reinstate the *San Antonio I* rate prescription as the last prior valid order. It should also be kept in mind that in its June 9, 1980 decision vacating the *San Antonio II* and *III* orders, the D.C. Circuit found that these orders permitted *two* returns on only one capital investment; improperly included returns on deferred taxes; and employed a measure of return of dubious validity, all of which, together with other mistakes indentified by the court, greatly inflated the freight rate. Under these circumstances, equitable as well as legal considerations supported the restoration of the *San Antonio I* rate level.

In its opinion of June 30, 1981, the lower court simply explained the effect of its earlier decision vacating the *San Antonio II* and *III* orders. The court was correct in holding that the effect was to reinstate the *San Antonio I* rate prescription. Accordingly, the carriers' Petition should be denied.

II.
THE PETITION PRESENTS NO IMPORTANT QUESTIONS

A. Introduction

As the railroads correctly recite, their dispute with San Antonio is a longstanding one, and has involved numerous court and regulatory actions over a seven (7) year period. It is in turn part of a broad spectrum of related disputes dealing with the economics of captive coal transportation by railroad. While there may be valid reasons why the Court ultimately should hear the merits of one or more of the many coal rate cases pending in the various Federal courts of appeals, the carriers' Petition here simply involves a highly technical dispute between the railroads and San Antonio which is unique to this case. The carriers' efforts to portray the lower court's action as in conflict with decisions of this Court and of another Federal court of appeals are transparent attempts to infuse with importance what is, in fact, a narrow procedural dispute between these parties alone.

Before taking up the various arguments of the carriers, it is in order to note two points. The first of these is a very important consideration lurking beneath the surface of each carrier allegation and which is, in fact, the true motivation for the Petition itself, but which argument, for obvious reasons, is never directly offered. Throughout their Petition the carriers make repeated allusions to their real concern, which holds that the *San Antonio I* rate level they were required to charge by operation of the *San Antonio I* rate order (not by the D.C. Circuit as they contend) is

outdated,[13] is grossly inadequate, results in great inequity to the railroads, creates a tremendous windfall for San Antonio, etc., etc. Whether the *San Antonio I* rate is too low or too high is today and has always been a hotly disputed issue between the railroads and San Antonio. As recently as October 31, 1981, in the ongoing phases of this case now before the Commission, San Antonio has presented voluminous support for its position that the *San Antonio I* rate is too *high*. Whether *San Antonio I* is too high, too low, or just right is, of course, not an issue which this Court is being asked to address. What it is being asked by the railroads to *assume*, however, is that it is, in fact, too low and that it was therefore in some fashion erroneous for the D.C. Circuit to conclude that the *San Antonio I* order was reinstated. We urge the Court not to be misled into such an assumption since San Antonio believes with equal fervor that the *San Antonio I* rate is too *high*.[14]

A second preliminary point to be kept in mind is that it was *the railroads* who asked the D.C. Circuit to consider the matter addressed in its June 30th decision which they challenge in their Petition. The carriers requested the court to "clarify" the effect of its decision vacating the ICC's *San Antonio II* and *III* orders.

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[13] As explained at n.9 *supra* this is simply incorrect. The *San Antonio I* rate level as applied after July 24, 1980 was adjusted for all general rate increases between October 1976 and July 24, 1980. All general rate increases accruing after July 24, 1980 were reflected in the rate paid by San Antonio as and when they became effective.

[14] It is a demonstrable fact that the *San Antonio I* rate is higher than rates subsequently approved as maximum reasonable rates for similar services elsewhere and now in effect. *See*, No. 37135, *Increased Rates on Coal, BN, Montana to Superior, Wisconsin*, 362 I.C.C. 625 (1980), *aff'd sub nom. Cleveland Cliffs Iron Co.* v. *I.C.C., supra;* I&S No. 9199, *Unit Train Rates on Coal — Burlington Northern, Inc.* (Decision served Oct. 1, 1980) (unprinted), *aff'd sub nom. Iowa Power & Light Co.* v. *Burlington Northern, Inc., supra;* No. 36980, *Southwestern Electric Power Co.* v. *Burlington Northern, Inc.* (Decision served Feb. 4, 1981) (unprinted).

Unhappy with the conclusion reached by the court, they now take the position that the court was without authority to do what they themselves asked it to do, namely to explain the effect of its earlier decision.

B. No Conflict Exists Between The Decision Of The Lower Court And This Court's Conrail Decision

The railroads' first attempt to come within this Court's Rule 17 considerations consists of an argument that the decision of the D.C. Circuit "conflicts" with "a closely similar case" (Petition at 11-16) recently decided by this Court — *Consolidated Rail Corp.* v. *National Ass'n of Recycling Industries, Inc.*, ____ U.S. ____ , 101 S.Ct. 775 (1981) ("*Consolidated Rail*"). According to the carriers' argument, the D.C. Circuit has once again intruded upon the domain of the Interstate Commerce Commission by improperly setting rail freight rates, an action which *Consolidated Rail* has held interferes with the exclusive jurisdiction of the ICC.

The railroads are only able to generate the needed "conflict" by methodically misstating what the lower court did. The court below *vacated* certain ICC rate prescription orders and nothing more. The resultant rate revival which so bothers the carriers, was (as the lower court correctly found) "not the result of some action by this Court, but the consequence of a pre-existing order forbidding higher tariffs." *San Antonio, Texas* v. *Burlington Northern, Inc.*, 655 F.2d 1341, 1344 fn.12 (D.C. Cir. 1981) (App. A-5 fn.12). [15]

In *Consolidated Rail*, the court of appeals had vacated an ICC order and then revoked certain rate increases implemented

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[15] In an untenable attempt to sidestep the obvious consequences of the lower court's mandate, the railroads have also charged that this mandate constituted only a "partial" vacation of the ICC's *San Antonio II* and *III* orders (Petition at 16). No support at all exists for this theory.

pursuant to that order. The court's decision was set aside by this Court on the grounds that the limit of the appellate court's authority was to vacate the ICC's decision and that it "stepped beyond the proper exercise of its power when it revoked rates implemented under [that ICC decision]." *Id.* 101 S.Ct. at 777. As the D.C. Circuit notes in its June 30th decision, in the *Consolidated Rail* case, "no other outstanding ICC order . . . prevented the railroads from filing the higher rates; instead *we took affirmative action on our own* to order that the rates be rescinded." *Id.* 655 F.2d, at 1343-44 (App. A-4-5) (emphasis added). The critical distinction in this case is that vacation by the court of the Commission's orders in *San Antonio II* and *III*, an action it clearly had authority to take, left in place another outstanding order of the Commission, namely *San Antonio I*. Thus, unlike *Consolidated Rail*, where the court acted affirmatively to revoke the carrier rates, in the instant situation the unlawfulness of the carriers' rates on file with the Commission arose by virtue of the pre-existing *San Antonio I* rate prescription order and the requirements of the law that a carrier not "publish, charge, or collect" (49 U.S.C. § 10704(a)(1)) a rate other than the rate established by a rate prescription order. The D.C. Circuit was acutely aware of the *Consolidated Rail* holding in reaching its decision and, for the reasons discussed above, its decision does not in any way conflict with that case or with *Atchison T.&S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973).

The carriers' contention that a conflict exists rests entirely upon their self-serving description of what the lower court did. The court did *not* revoke any rates and it did *not* require the railroads to charge any particular price. As it very clearly stated, all it did was vacate certain ICC orders. The *consequence* of the lower court's action was that the effectiveness of a pre-existing ICC order was restored and, as the lower court noted (*id.*, 655 F.2d at 1345, App. A-6), the railroads should

have gone to the ICC, not the court, to seek redress from that ICC order — something which the carriers eventually and successfully did. [16] Through their Petition, the railroads strive to reverse the financial effects of their mistaken choice of remedies by ascribing actions to the lower court that it never took and then arguing that its non-existent actions are in conflict with this Court's rulings.

C. No Conflict Exists With The Decision Of The Fifth Circuit

In a second and related attempt to generate the requisite Rule 17 conflict and secure favorable action on their Petition, the railroads also assert that the lower court's decision conflicts with a decision of the United States Court of Appeals for the Fifth Circuit in *San Antonio, Texas* v. *Burlington Northern, Inc.*, 650 F.2d 49, *clarified*, 652 F.2d 422 (5th Cir. 1981). According to the Petitioners, there exists "a fundamental disagreement between the circuits as to the proper role of courts in the ICC ratemaking system." (Petition at 17-18). Here again we have an effort by the Petitioners to attribute wide-reaching significance to a limited and highly technical issue through a self-serving but erroneous description that two Federal circuit courts are divided over the proper role of the judiciary in the railroad ratemaking system. Nothing could be less accurate!

In point of fact, the Fifth Circuit expressly noted that the legal effect of the D.C. Circuit's decision was before the D.C. Circuit and also that the ICC had acted to resolve any doubts on this question by vacating the *San Antonio I* rate prescription "to the extent it remained viable after the D.C. Circuit's decision." *San Antonio, Texas* v. *Burlington Northern, Inc.*, *supra*, 650 F.2d at 52. Thus, the Fifth Circuit clearly did not rule in any fashion on the issue before the D.C. Circuit in the decision

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[16] *See, San Antonio, Texas* v. *Burlington Northern, Inc.*, 364 I.C.C. 887 (1981) (App. F).

below, namely, whether vacation of the *San Antonio II* and *III* orders reinstated the *San Antonio I* rate prescription.

In short, there is no conflict between the D.C. Circuit and the Fifth Circuit of the sort described by the railroads as a result of the *San Antonio* case because the legal point with which the D.C. Circuit was involved was *not* raised in the Fifth Circuit, indeed, was specifically recognized as not being at issue, and *a fortiori* was not resolved by that court. Here again we have but another attempt to infuse with a substance worthy of this Court's consideration, a narrow issue of limited significance. [17]

D. No Conflict Exists With The Filed Rate Doctrine

To augment the other claimed conflicts, the carriers allege still a third, separate conflict created by the decision below; namely, a conflict with the so-called "filed rate doctrine" explained in *Arkansas Louisiana Gas Co.* v. *Hall*, ____ U.S. ____ , 101 S.Ct. 2925 (1981) *("Arkla")*. This claim, like the others, is without merit.

The *Arkla* case concerned ratemaking under the Natural Gas Act rather than railroad rates under the Interstate Commerce Act. More important, however, is the fact that the situation presented in this case is radically different from *Arkla*. Here, the only rates on file with the ICC during the time periods at

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[17] Meanwhile, Petitioners have glossed over a serious jurisdictional question raised by their Petition; namely, whether it is timely. The timeliness of the carriers' Petition under this Court's Rule 20 depends in turn upon whether the lower court's opinion of June 30, 1981, "disturbed or revised legal rights and obligations which by its prior judgment had been plainly and properly settled with finality." *F.T.C.* v. *Minneapolis-Honeywell Co.*, 344 U.S. 200, 212 (1952). Plainly, the second opinion did not revise any legal rights because the court said on June 30, 1981, that on June 9, 1980, it did exactly what it said it did and nothing more. The untimeliness of the railroads' Petition is but a further consequence of the fact that it is part of a belated effort to repair purported damage caused by their choice of the wrong procedures for rate relief in the first place.

issue were rates which manifestly contravened a valid outstanding rate prescription order of the Commission.

In such circumstances it is the ICC order, not the inconsistent tariff rate, which must prevail. The courts and the Commission have held repeatedly that carrier tariffs which contravene ICC rate orders are null and void. *See, e.g., Armour & Co.* v. *Louisville Southern Ry.*, 190 F.2d 925, 927 (5th Cir. 1951), *cert. denied* 342 U.S. 913 (1952); *Foreston Coal International, et* . v. *Baltimore & Ohio R.R.*, 349 I.C.C. 495, 499-500, *aff'd sub nom. Island Creek Coal Sales Co.* v. *I.C.C.*, 561 F.2d 1219 (6th Cir. 1977); *Nashville Traffic Bureau* v. *Louisville & Nashville R.R.*, 53 I.C.C. 37, 38 (1919).

Through a studied misapplication of certain rulings under a different regulatory statute, the carriers seek to divert the attention of the Court from its determinative ruling on this very subject. As discussed above, this Court underscored the supremacy of ICC rate prescription orders over inconsistent carrier-filed tariffs when it held in *Arizona Grocery* that carriers may not simply file increases in their ICC-prescribed rates, but rather must "conform to the or' : of the Commission" until they can persuade the agency to modify its order and fix a "more adequate rate for the future." *Id.*, 284 U.S. at 387-388. The carriers' Petition seeks in effect to have the Court overrule its *Arizona Grocery* Doctrine which has stood unquestioned for fifty (50) years.

E. The Decision Below Respects Rather Than Undermines The Ratemaking Scheme

Finally, the carriers contend that the decision below would "undermine the ratemaking scheme" because reinstatement of outstanding rate orders when subsequent orders modifying them have been vacated will "seriously impair the carriers' ability to earn adequate revenues during times of rapidly rising costs," and will impose "an unwarranted burden on the carrier's

exercise of its right to judicial review [of the subsequent orders]." (Petition at 21-25).

There are several answers to this makeweight argument. To begin with, it should be noted that the lower court's decision only applies in the highly unusual situation where vacation of one rate prescription leaves outstanding a prior rate prescription which is violated by a published rate. The rarity of such circumstances is reflected in the fact that there is only one reported precedent relevant to this situation — the *Atlantic Coast Line* case. Thus, the concerns expressed by the carriers are of *extremely* limited consequence.

More fundamentally, even in the rare case where a prior rate order exists, the carrier would be free to urge a reviewing court to remand the order for further consideration without vacating it (*cf. Celanese Chemical Co.* v. *United States, supra,* 632 F.2d at 579) or the carrier could promptly seek an interim rate order from the Commission (as Petitioners finally and belatedly did in this case). Having taken neither of these actions on a timely basis, the carriers in this proceeding have only themselves to blame for the application of the *San Antonio I* rate order between July 1980 and May 7, 1981. [18]

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[18] The carriers' theory, of course, is that the court's vacation of the *San Antonio II* and *III* orders left the carriers free from *any* Commission-prescribed rate ceiling. Certainly acceptance of this theory would impose an unwarranted and unfair burden upon *San Antonio's* exercise of its right to judicial review.

CONCLUSION

The railroads seek relief from a freight rate established by the ICC under the guise of an attack upon lawful and proper actions by the D.C. Circuit. For the reasons stated, we urge that their Petition be denied.

Respectfully submitted,

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Dated: January 27, 1982

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
FEB 11 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1008

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

BURLINGTON NORTHERN INC. AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RAILROADS' REPLY TO BRIEF OF RESPONDENT SAN ANTONIO, TEXAS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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February 11, 1982

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
INTRODUCTION	1
ARGUMENT	2
I. San Antonio's Arguments In Opposition To The Petition For Writ Of Certiorari Are Without Merit	2
II. San Antonio's Other Contentions Are Irrelevant And Rest Ultimately On Distortions Of The Record	9
CONCLUSION	14

TABLE OF AUTHORITIES

CASES

Arizona Grocery v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932)	3, 5, 9
Arkansas Louisiana Gas Co. v. *Hall*, U.S. , 101 S. Ct. 2925 (1981)	7, 14
Armour & Co. v. *Louisville Southern Ry.*, 190 F.2d 925 (5th Cir. 1951), *cert. denied*, 342 U.S. 913 (1952)	7
Atlantic Coast Line R. R. Co. v. *Florida*, 295 U.S. 301 (1935)	3–5
Consolidated Rail Corp v. *National Association of Recycling Industries, Inc.*, 449 U.S. 609 (1981)	2, 3, 14
Consolidated Rail Corp v. *United States*, 619 F.2d 988 (3d Cir. 1980)	9

	Page
Federal Trade Commission v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965)	12
Federal Trade Commission v. *Minneapolis-Honeywell Co.*, 344 U.S. 206 (1952)	12
Greene v. *McElroy*, 360 U.S. 474 (1959)	4
Greene v. *United States*, 376 U.S. 149 (1964)	4
Lowden v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939)	7
Pennsylvania R. Co. v. *International Coal Co.*, 230 U.S. 184 (1913)	7
San Antonio, Texas v. *Burlington Northern Inc.*, 650 F.2d 49, *clarified*, 652 F.2d 422 (5th Cir. 1981)	6, 7
San Antonio, Texas v. *United States*, 631 F.2d 831 (D. C. Cir. 1980)	11
San Antonio, Texas v. *United States*, 655 F.2d 1341 (D.C. Cir. 1981)	6
Southern Pacific Transportation Co. v. *Commercial Metals Co.*, 641 F.2d 235 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3402 (Nov. 16, 1981)	8
United States v. *Morgan*, 307 U.S. 183 (1939)	5
ICC CASES	
Acme Peat Products Ltd. v. *Akron, Canton & Youngstown R. Co.*, 293 I.C.C. 510 (1954)	8
Dewey Portland Cement Co. v. *Atchison, Topeka & Santa Fe Ry. Co.*, 188 I.C.C. 97 (1932)	8

	Page
Foreston Coal International v. *Baltimore & Ohio R. R. Co.*, 349 I.C.C. 495 (1975), *aff'd sub nom. Island Creek Coal Sales Co.* v. *I.C.C.*, 561 F.2d 1219 (6th Cir. 1977)	7
Kansas City Fuel Oil Co. v. *Atchison, Topeka & Santa Fe Ry. Co.*, 210 I.C.C. 134 (1935)	8
Nashville Traffic Bureau v. *Louisville & Nashville R.R.*, 53 I.C.C. 37 (1919)	7
San Antonio, Texas v. *Burlington Northern Inc.*, 355 I.C.C. 405 (1976) *(San Antonio I)*	*passim*
San Antonio, Texas v. *Burlington Northern Inc.*, 359 I.C.C. 1 (1978) *(San Antonio II)*	*passim*
San Antonio, Texas v. *Burlington Northern Inc.*, 361 I.C.C. 482 (1979) *(San Antonio III)*	*passim*

STATUTES

Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895:	
§ 202, 49 U.S.C. § 10709	10
§ 203(c)	10

REGULATIONS

49 C.F.R. 1100.22a(4)	12
49 C.F.R. 1100.24	12

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RAILROADS' REPLY TO BRIEF OF RESPONDENT SAN ANTONIO, TEXAS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Federal Respondents, the United States and Interstate Commerce Commission, have filed a brief in which they join the railroads in urging that the Petition for Certiorari be granted. This Reply is filed in response to the Brief in Opposition filed by Intervenor-Respondent San Antonio, Texas ("San Antonio").

INTRODUCTION

San Antonio's Brief in Opposition is long on invective about the railroads' supposed "unfair rail pricing practices" and "legal maneuvers,"[1] and short on any explanation as to how the decision below can be reconciled with the Interstate Commerce Commis-

[1]Brief of Respondent San Antonio, Texas in Opposition at 2, 5.

sion's exclusive authority to regulate railroad rates. The issue here is not whether the railroads' rates have been too high or too low, but *who* is to decide what level of rates is appropriate. San Antonio apparently thinks that, in the circumstances here presented, rates can be determined by the Court of Appeals. The railroads and the Federal Respondents believe the matter has been committed to the exclusive jurisdiction of the Commission.

ARGUMENT

I. SAN ANTONIO'S ARGUMENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI ARE WITHOUT MERIT

The Court of Appeals in this case has declared unlawful tariff rates on file with the Interstate Commerce Commission which the Commission has never found unlawful. According to the court, it was unlawful for the railroads to charge any rate higher than the rate prescribed in *San Antonio I* for the period from July 24, 1980 to May 7, 1981. Yet the Commission has *never* determined that *San Antonio I* represents the maximum reasonable rate for this period. The lower court's order therefore directly conflicts with this Court's holding in *Consolidated Rail Corp.* v. *National Ass'n of Recycling Industries, Inc.*, 449 U.S. 609, 611 (1981), that a reviewing court is "without authority" to determine the level of rates that may be charged pending reconsideration of a rate order by the Commission.

1. San Antonio maintains that this case is distinguishable from *Consolidated Rail* because here the Court of Appeals did not act "affirmatively to revoke" the filed rates; it merely declared that *San Antonio I* was "revived" and hence that filed tariff rates inconsistent with that order were "unlawful".[2] This is a distinction without any functional significance.

[2]Brief of Respondent San Antonio, Texas in Opposition at 12.

Whether the Court of Appeals enjoins carriers from collecting filed rates, or renders a declaratory judgment that filed rates are "unlawful," the result is the same: the court, rather than the Commission, has determined the rates to be charged pending remand. As the railroads explained in their Petition (at 3-4, 15), when the Court of Appeals declared *San Antonio I* revived and the filed rates "unlawful", it interfered with the Commission's exclusive authority to regulate rates just as much as it did by "revoking" filed rates in *Consolidated Rail.*

2. San Antonio also contends that because this case involves multiple rate orders, it is not governed by *Consolidated Rail*, but by *Atlantic Coast Line R.R. Co.* v. *Florida*, 295 U.S. 301 (1935), and *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932)—two cases which were not discussed or even cited by the Court of Appeals. Neither decision provides any support for the ruling below.

Atlantic Coast Line did not present the question at issue here. Rather, the question was whether a carrier which had collected rates pursuant to a rate order later set aside on judicial review was required to make restitution to shippers. This Court concluded that, at least where the Commission had subsequently reinstated its order and the order was then sustained on review, restitution was not required. The passage in *Atlantic Coast Line* upon which San Antonio relies (295 U.S. at 324) does not appear in Justice Cardozo's opinion for the Court, but rather in the *dissenting opinion* of Justice Roberts. In any event, it does not concern the issue presented in that case, but merely purports to describe the case's procedural history. As such, this passage has no authoritative force whatsoever.[3]

[3]Moreover, the orders in *Atlantic Coast Line* described by Justice Roberts' dissenting opinion were clearly distinguishable from those here. After the Interstate Commerce Commission in that case issued its order superseding the rate prescription order of the Railroad Commis-

(Footnote continued on next page.)

Indeed, *Atlantic Coast Line* supports the railroads' position rather than San Antonio's. The Interstate Commerce Commission's order set aside in *Atlantic Coast Line*, like the *San Antonio II* and *San Antonio III* orders, was vacated because "the findings of the Commission were incomplete and inadequate". (295 U.S. at 305.) After further proceedings, the Commission made new findings and this time the order was upheld. In these circumstances, this Court rejected the notion that a court of equity should "make the carrier pay the price of the blunders of the com-

(Footnote continued from previous page.)
sion of Florida, but *before* the ICC's order became effective, the Florida Commission issued a second order providing that its prior order would be suspended "so long as federal Commission's order should remain in force". (295 U.S. at 323.) Consequently, when the ICC's order was subsequently set aside on judicial review, the prior Florida prescription again governed the rail movements in question—*not* because this was the inevitable effect of the reviewing court's decision, but because of the express terms of the Florida Commission's second order.

There is no order in this case which even remotely corresponds to the second order of the Florida Commission in *Atlantic Coast Line*. The ICC did not, in its decision in *San Antonio II*, provide that the *San Antonio I* prescription would be modified "so long as *San Antonio II* shall be in force". Nor did the Commission issue an order, after the *San Antonio II* and *San Antonio III* orders were vacated, stating that the railroads should reduce their tariffs to the *San Antonio I* level. The only basis in this case for claiming that the *San Antonio I* order sprang back into effect is the assertion that the D.C. Circuit's initial decision necessarily had such an effect—a contention which is clearly inconsistent with *Consolidated Rail*.

Greene v. *United States*, 376 U.S. 149 (1964), cited by San Antonio at p.7, involved a very different type of order than that involved here. In *Greene*, the Defense Department revoked petitioner's security clearance without affording him an adversary-type hearing. This Court reversed, holding that in the absence of explicit authorization from the President or Congress, an adversary-type hearing was required. (*Greene* v. *McElroy*, 360 U.S. 474, 508 (1959).) On remand to the district court, and with the *express consent* of the Government, the district court then entered an order "voiding and expunging all determinations adverse to petitioner". (376 U.S. at 160.) On this basis, petitioner then asked for back pay for the period involving the procedurally-flawed revocation.

There is no Commission order in this case "voiding and expunging" the railroads' tariffs following the initial decision of the D.C. Circuit.

merce board in drawing up its findings". (*Id.* at 314.) The Court concluded that "restitution is without support in equity and conscience, whatever support may come to it from procedural entanglements". (*Id.* at 312-13.)

Here, San Antonio is asserting that the Court of Appeals, by declaring *San Antonio I* revived and the railroads' filed rates unlawful, may in effect award San Antonio a huge windfall and penalize the railroads because of the Commission's failure to provide adequate support for its decisions in *San Antonio II* and *San Antonio III*. Such a result would be totally inconsistent with the underlying rationale of *Atlantic Coast Line* that the ultimate resolution of a rate case remanded by a reviewing court to a regulatory agency should be based on "equity and conscience" rather than "procedural entanglements". (*Accord, United States* v. *Morgan*, 307 U.S. 183, 190-98 (1939).)

3. The second case relied upon by San Antonio, *Arizona Grocery*, is even further wide of the mark. The portion of *Arizona Grocery* relied upon (which was not a holding but *obiter dicta*) purports to describe the procedures followed in setting aside a Commission rate prescription. (284 U.S. at 387-88.) However, the immediate issue here is not what procedures should be followed in setting aside a Commission rate prescription, but rather whether there *is* any revived rate prescription which must be set aside. *Arizona Grocery* does not speak to this issue.

Ironically, San Antonio's reliance on *Arizona Grocery* completely undercuts its later assertion that the railroads could have obtained immediate "interim relief" from the revived *San Antonio I* through some type of summary proceeding.[4] San Antonio relies on *Arizona Grocery* for the proposition that a rate prescription may be set aside only upon a "new hearing"—which, in San Antonio's view, would include the institution of a new adjudicatory proceeding complete with witnesses, documentary evidence,

[4]Brief of Respondent San Antonio, Texas in Opposition at 16.

and cross-examination. By the time a proceeding such as that advocated by San Antonio could be completed, however, the railroads would have suffered irreparable injury because of the substantial delays inherent in such procedures.[5]

4. San Antonio contends that there is no conflict between the decision below and the decision in *San Antonio, Texas* v. *Burlington Northern Inc.*, 650 F.2d 49, *clarified*, 652 F.2d 422 (5th Cir. 1981), because the Fifth Circuit did not rule on the precise question before the D.C. Circuit: whether the *San Antonio I* order had been revived during the period from July 24, 1980 to May 7, 1981. This ignores the fact that the two decisions reflect totally conflicting conceptions of judicial and administrative authority.

The Fifth Circuit held that, even assuming *San Antonio I* had been revived, there was no judicial power to interfere with the filed tariff rate pending final action by the Commission. (650 F.2d at 53.) The D.C. Circuit has ruled, again on the assumption that *San Antonio* was revived, that the court *did* have power to declare the filed tariff "unlawful." As noted above, it is a matter of form rather than substance whether a court "enjoins" or "revokes" a

[5]As the railroads noted in their Petition at 15, and as Federal Respondents also recognized in their Brief at 13, the injury to the railroads necessarily inflicted as a result of the procedures advocated by San Antonio would occur not only because of the delay inherent in such procedures, but also because San Antonio's theory completely forecloses the Commission from protecting the railroads' interests in the interim period between the court's order and the Commission's prescription of a new rate. Under San Antonio's theory, the railroads could never collect the filed tariff rate as to traffic which moved during that interim period, even if the Commission subsequently found it to have been the reasonable rate for that period. The railroads' and Federal Respondents' theory, on the other hand, allows for the protection of the interests of *both* parties during the interim period. If the Commission later found the *San Antonio III* rate to have been reasonable, the railroads would be entitled to these funds; if the Commission found that rate to be too high, San Antonio would in appropriate circumstances be entitled to reparations. *See* Brief of Federal Respondents at 13.

filed tariff, or declares a filed tariff "unlawful." In either case, the court has substituted its judgment for that of the Commission, and usurped the Commission's authority to regulate rates.

5. San Antonio argues that there is no conflict between the decision below and the filed rate doctrine of *Arkansas Louisiana Gas Co.* v. *Hall*, U. S. , 101 S.Ct. 2925 (1981), because that case concerned ratemaking under the Natural Gas Act rather than the Interstate Commerce Act.[6] However, the Court in *Arkansas Louisiana* expressly noted that the filed rate doctrine "has its origins in this Court's cases interpreting the Interstate Commerce Act, *see, e.g., Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520-521 (1939); *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U.S. 184, 196-197 (1913), and has been extended across the spectrum of regulated industries." (*Id.* at 2930.) There is thus no basis for asserting that the principles of *Arkansas Louisiana* are confined to cases arising under the Natural Gas Act.

San Antonio also asserts that the filed rate doctrine does not apply when carrier tariffs "contravene ICC rate orders."[7] This is

[6]Brief of Respondent San Antonio, Texas in Opposition at 14.

[7]Brief of Respondent San Antonio, Texas in Opposition at 15. The cases cited by San Antonio in support of this argument are clearly misapplied. The Courts in *Armour & Co.* v. *Louisville Southern Ry.*, 190 F.2d 925 (5th Cir. 1951), *cert. denied*, 342 U.S. 913 (1952), and *Foreston Coal Int'l* v. *Baltimore & Ohio R.R. Co.*, 349 I.C.C. 495 (1975), *aff'd sub nom. Island Creek Coal Sales Co.* v. *I.C.C.*, 561 F.2d 1219 (6th Cir. 1977), held only that the *Commission* had the power to enforce the collection of rates prescribed by its orders where the railroads failed technically to comply with the tariff publication and filing requirements of the Act. *Nashville Traffic Bureau* v. *Louisville & Nashville R.R.*, 53 I.C.C. 37 (1919), on which respondent also relies, is completely irrelevant. There the Commission declared "null and void" a tariff filed immediately after a Commission prescription which directly contravened the Commission's order. (*Id.* at 38.) None of these cases dealt with the question of whether a *court* has the power to decide whether filed tariffs violate ICC orders, or are otherwise void or enforceable.

simply incorrect. The ICC has repeatedly ruled that unless and until a published tariff rate is set aside upon a timely complaint, the shipper is obligated to pay the tariff rate, *even if* that rate is in violation of an outstanding rate prescription order. *Acme Peat Products, Ltd.* v. *Akron, Canton & Youngstown R. Co.*, 293 I.C.C. 510, 510-511 (1954); *Kansas City Fuel Oil Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 210 I.C.C. 134, 136 (1935); *Dewey Portland Cement Co.* v. *Atchison, T. & S. F. Ry. Co.*, 188 I.C.C. 97 (1932). As the Commission held in *Kansas City Fuel Oil Co.*, *supra*, 210 I.C.C. at 136:

> "A rate published in a tariff on file with the Commission *even though in contravention of its order* would still be the legal rate." (Emphasis supplied.)

The decision below conflicts with this established principle and should be set aside.[8]

6. Finally, San Antonio suggests that the lower court's order will not undermine the I.C.C. ratemaking scheme because the decision is "unique," and because alternate procedures are available to blunt the impact of the court's decision. However, the fact that the D.C. Circuit's theory has not been asserted by shippers or others in the past does not mean—now that it has been accepted by a court—that it would not play havoc with the statutory ratemaking scheme in the future. Indeed, in partial reliance on the D.C. Circuit's decision in this case, parties to a review proceeding in the Third Circuit are currently attempting to obtain a judicial rollback of rates, on the grounds that a 1980 decision of that court vacating in part a Commission order establishing per diem (car rental) charges "revived" an earlier Commission order, requiring a rollback in charges to the level established *in 1968*. (Motion to Recall and Clarify Mandate (December 24, 1981),

[8]The filed rate principle is also at issue in *Southern Pacific Transportation Co.* v. *Commercial Metals Co.*, 641 F.2d 235 (5th Cir. 1981), as to which this Court granted review on November 16, 1981 (Docket No. 81-622).

Consolidated Rail Corp. v. *United States*, 619 F.2d 988 (3d Cir. 1980).)[9]

Nor is there any merit to San Antonio's suggestion, echoing the Court of Appeals, that the railroads "could promptly seek an interim rate order from the Commission."[10] As noted above, this statement conflicts with San Antonio's earlier assertion, relying upon *Arizona Grocery*, that the "revived" *San Antonio I* could be set aside only after a full hearing. Moreover, the Commission's rules make no specific provision for petitions by rail carriers for "emergency" or "interim" rate relief. The only alternatives available to carriers are the institution of a new rate proceeding or the filing of a new tariff.[11]

II. SAN ANTONIO'S OTHER CONTENTIONS ARE IRRELEVANT AND REST ULTIMATELY ON DISTORTIONS OF THE RECORD

San Antonio has also advanced other contentions which are essentially irrelevant to the question whether the Petition should be granted. These contentions rest, ultimately, on distortions of the record.

1. San Antonio claims that there are "two (2) sides" to the question whether the *San Antonio I* rate is too low, and that it in fact believes with "fervor" that the *San Antonio I* rate is too

[9]Furthermore, as Federal Respondents noted in their Brief at 16, the Commission "has numerous other rate cases before it" in which parties may seek to raise this issue; and that "unless the decision is reversed," the D.C. Circuit opinion could inject "needless complications" into countless ongoing proceedings of the federal regulatory agencies.

[10]Brief of Respondent San Antonio, Texas in Opposition at 16.

[11]In fact, in order to facilitate resolution of the controversy in this case over which rate applied, the railroads in November of 1980 filed a new tariff (at the *San Antonio III* level). Although San Antonio vigorously opposed this procedure, the Commission voted unanimously to allow the new tariff to become effective without suspension as of December 31, 1981. Even then, however, San Antonio refused to pay the tariff rate. Thus, even if San Antonio's theory as to the revival of *San Antonio I* were correct (which it is not), this history completely undercuts San Antonio's argument that the railroads could have promptly obtained some form of "interim relief"; when the Commission provided such "relief," San Antonio ignored it.

high.[12] This claim, of course, is irrelevant to the question presented. The question is not whether the *San Antonio I* rate is too high or too low, but who should decide the applicable rate level: the Court of Appeals or the Commission. The mere fact that there is a *substantial probability* that *San Antonio I* is too low means that the Court of Appeals' order may impose serious and irreparable harm on the railroads.

In any event, there is no legitimate debate between the parties over whether *San Antonio I* is too low. As the Commission has observed, the *San Antonio I* rate—which was prescribed in 1976 based on a record reflecting 1975 costs—was based on legal and regulatory standards which are completely outdated (App. F.8). In a pleading submitted to the Commission in December, 1980, San Antonio, recognizing this fact, stipulated that it would "not contest" imposition of a rate of $20.00 per ton. (*Petition In The Alternative*, I.C.C. Docket No. 36180, December 18, 1980, at 20.) This was $4.17 per ton *higher* than the *San Antonio I* rate level at that time ($15.83 per ton). Moreover, based on San Antonio's *own* computations of costs submitted at that time, the *San Antonio I* rate was only 123.6 percent of variable costs[13]—well below the present 165 percent threshold for Commission maximum rate jurisdiction established by the Staggers Rail Act of 1980. 49 U.S.C. § 10709(d)(2)(B). Thus, on San Antonio's own evidence, there was no possibility that the Commission would impose a rate as low as the *San Antonio I* level.[14]

[12]Brief of Respondent San Antonio, Texas in Opposition at 6 n. 12. The "evidence" referred to by San Antonio in support of its position that the *San Antonio I* rate is too high is contained in a recent submission to the Commission which *expressly excludes* the period here in contention—July 24, 1980 to May 7, 1981. (*Opening Statement of Fact and Argument*, I.C.C. Docket No. 36180, October 30, 1981, Preface, at 917.)

[13]The railroad evidence submitted to the Commission at this time showed that the *San Antonio I* rate was 100 percent of variable costs—*i.e.*, that the rate was barely high enough to cover those costs which directly vary with the service being provided.

[14]In fact, the *San Antonio I* rate level falls far below even the special *162 percent* rate ceiling set out in Section 203(c) of the Staggers Act, Pub. L. 96-448, 94 Stat. 1904, which San Antonio has elsewhere claimed applies to its coal movement. (*Opening Statement*, cited in note 12 *supra*, at 915.)

2. San Antonio also suggests that when the D.C. Circuit "vacated" the Commission's maximum rate prescriptions in *San Antonio II* and *San Antonio III*, the court was somehow implicitly granting a request by San Antonio "to reinstate the rate level prescribed in *San Antonio I*".[15] There is no basis for this suggestion.

In the proceedings before the D.C. Circuit, the railroads and San Antonio *both* asked the court to vacate the maximum rate prescriptions in *San Antonio II* and *San Antonio III*. In its brief, San Antonio did *not* ask the court to reinstate *San Antonio I*, but simply asserted, in one sentence, what it believed the effect of a decision to vacate *San Antonio II* and *San Antonio III* would be:

> "Since there would then be no order of the Commission altering its original prescription, *the carrier tariffs would have to be amended* to reinstate the rate level prescribed in *San Antonio I*." (Emphasis supplied.)[16]

The railroads, in reply, pointed out that a decision vacating *San Antonio II* and *San Antonio III* would *not* result in the revival of *San Antonio I*:

> "[T]he Supreme Court has expressly ruled that when Commission decisions in rate cases are set aside, the existing carrier-made rates continue in effect unless and until changed by the Commission upon remand. *Atchison, T. & S. F. Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 819, 828-29 (1973). Shippers such as San Antonio are not injured by such a procedure because the Commission has the authority to order reparations in appropriate cases (49 U.S.C. §11705(b)(2))."[17]

When the D.C. Circuit issued its decision "vacating" the Commission's orders and remanding for further proceedings, it did not

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[15]Brief of Respondent San Antonio, Texas in Opposition at 4; *see also id.* at 8.

[16]Brief of Petitioner San Antonio at 51, *San Antonio, Texas* v. *United States*, 631 F.2d 831 (D.C. Cir. 1980).

[17]Brief of Railroad Respondents Intervenors at 38, *San Antonio, Texas* v. *United States*, 631 F.2d 831 (D.C. Cir. 1980).

refer to this brief exchange between the parties, nor did it state any conclusion as to the effect of its decision on the filed tariff rate. Thus, there is no basis for asserting that the court had adopted San Antonio's theory of the effect of its decision.[18]

3. The principal significance of San Antonio's early representations to the D.C. Circuit as to the effect of a vacation of the Commission's orders is San Antonio's statement that if the *San Antonio I* prescription were revived, "*the carrier tariffs would have to be amended.*" After one brief attempt to persuade the Commission staff to order the tariffs amended,[19] San Antonio disregarded its own statement to the D.C. Circuit and, without making any further attempt to seek a *Commission* order modifying the tariff rate, unilaterally began to remit payments to the railroads at the *San Antonio I* level. This is the background of the so-called "legal maneuvers" San Antonio refers to in its Brief. San Antonio

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[18]For this reason, San Antonio's challenge to the timeliness of this Petition is frivolous. The Court of Appeals' decision under review clearly "resolve[d] a genuine ambiguity in a judgment previously rendered," and dealt with a question which was not "plainly and properly settled with finality" in the court's initial decision. *FTC* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211-12 (1952). The first decision did not even mention what would be the effective rate in light of the court's order, and the extensive proceedings that ensued to resolve this question, both in the Commission and in the Fifth Circuit, certainly belie the notion that the question was satisfactorily settled in the first decision. Under the test enunciated in *Minneapolis-Honeywell*, 344 U.S. at 212, and followed by this Court more recently in *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 378-84 (1965), the Petition clearly is timely.

[19]On October 22, 1980, San Antonio filed an informal complaint with the Commission's Tariff Integrity Board, asserting that the filed rate was inconsistent with *San Antonio I*. This request was *denied* by the Board, on the ground that "neither the court nor the Commission has, as yet, ordered an adjustment in the presently published tariff rate." (ICC Staff Letter of October 30, 1980.) Although San Antonio had the right to appeal this decision to the Commission (49 CFR 1100.22a (4)), it chose not to do so. Nor did San Antonio file a formal complaint with the Commission (49 CFR 1100.24 *et seq.*) or amend its pending complaint in the *San Antonio* docket (No. 36180).

knew that the proper procedure to obtain a reduction in the tariff rate to the *San Antonio I* level was to ask the Commission to order such a reduction. Its disregard of that proper procedure, together with its refusal to pay the filed tariff rate, are the root causes of the multiple proceedings generated in this case.

CONCLUSION

For the reasons set forth above and in the railroads' Petition, and the reasons stated by the Federal Respondents, certiorari should be granted and the decision below should be summarily reversed on the authority of *Consolidated Rail*, *supra*, and *Arkansas Louisiana*, *supra*. In the alternative, certiorari should be granted, and the case should be set for briefing and oral argument.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
MAY 17 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1008

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BURLINGTON NORTHERN INC. AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

When a maximum rate order of the Interstate Commerce Commission is vacated and remanded by a reviewing court for further explanation of the Commission's action, this Court has held that the reviewing court is "without authority" to compel a reduction in tariff rates which have been filed pursuant to the Commission's order. *Consolidated Rail Corp.* v. *National Ass'n of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981). For the court to go beyond review of the Commission's order, and dictate the level of rates which may be charged pending the Commission's decision on remand, would constitute impermissible judicial interference with the Commission's exclusive jurisdiction to determine the maximum level of rates. *Id.*

This Court has further held that a carrier may not charge, and a shipper may not pay, any rate other than the one contained in the tariff on file with the Commission. Under this "filed rate doctrine," not only carriers and shippers, but also *courts* are without authority to impose any rate different than the duly-filed tariff rate. *Arkansas Louisiana Gas Co.* v. *Hall*, —— U.S. ——, 101 S.Ct 2925 (1981).

This case concerns the proper application of these principles when (1) the Commission issues a rate order, (2) the Commission subsequently modifies this rate order and issues new orders permitting and approving higher maximum rates, and (3) a reviewing court vacates and remands the latter Commission orders on the ground that they were inadequately supported or justified. In the proceedings below, the United States Court of Appeals for the District of Columbia Circuit held that its decision vacating and remanding certain Commission orders had "revived" the earlier Commission order and that tariff rates filed pursuant to the vacated orders were therefore "unlawful" — in

effect requiring that the rates contained in the filed tariffs be rolled back to the level prescribed by the earlier order.

The question presented is whether the United States Court of Appeals for the District of Columbia Circuit, having set aside the Commission's rate order, can declare the existing tariff rate "unlawful," and thereby determine the rate which may be charged by a railroad pending the Commission's decision on remand, on the theory that an earlier Commission rate order had been "revived."

RULE 28.1 STATEMENT

The statement required by Supreme Court Rule 28.1 is set forth at page iii of the Petition for Writ of Certiorari.*

* The parties to the proceedings below, in addition to those listed in the caption, were San Antonio, Texas, Acting By and Through Its City Public Service Board, and the State of Texas.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
A. THE COMMISSION'S ORDERS IN *SAN ANTONIO I*, *SAN ANTONIO II*, and *SAN ANTONIO III*	3
B. THE COURT OF APPEALS' REVIEW OF *SAN ANTONIO II* AND *SAN ANTONIO III*	6
C. THE DISPUTE OVER THE MEANING OF THE COURT OF APPEALS' MANDATE	9
D. THE COURT OF APPEALS' CLARIFICATION OF MANDATE	16
SUMMARY OF ARGUMENT	17
ARGUMENT	20
I. THE DECISION BELOW INTERFERES WITH THE INTERSTATE COMMERCE COMMISSION'S EXCLUSIVE AUTHORITY TO DETERMINE MAXIMUM REASONABLE RATES	20
A. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE PRINCIPLES ESTABLISHED BY *ARROW*, *SCRAP*, *WICHITA BOARD OF TRADE* AND *CONSOLIDATED RAIL*	20
B. THE PRIOR ORDER IN *SAN ANTONIO I* DOES NOT MODIFY THE PRINCIPLES APPLICABLE TO THIS CASE	28
1. The Court of Appeals Did Not Set Aside That Portion of *San Antonio II* Which Found That *San Antonio I* Was Too Low And Should Be Lifted	29

PAGE

2. The Court Of Appeals Should Have Deferred To The Commission's Interpretation Of *San Antonio I* 30

3. *Wichita Board Of Trade* And *Consolidated Rail* Do Not Require The Court To Restore The Status Quo Before The Rate Orders Were Issued 32

4. The Court Of Appeals Was Not Compelled To Take "Affirmative Action" To Reach A Contrary Result 33

II. THE DECISION BELOW IS PATENTLY UNFAIR TO THE RAILROADS AND DISRUPTIVE OF THE RATEMAKING SCHEME 34

A. THE COURT OF APPEALS' DECISION REPRESENTS A POTENTIAL LOSS TO THE RAILROADS AND A WINDFALL GAIN TO SAN ANTONIO OF NEARLY $20 MILLION 34

B. THE DECISION BELOW WOULD DISRUPT THE RATEMAKING SCHEME 36

C. THE DECISION BELOW WOULD UNDERMINE THE RIGHT OF RAILROADS OR OTHER REGULATED ENTITIES TO OBTAIN JUDICIAL REVIEW OF AGENCY RATE ORDERS .. 37

D. NO "SUITABLE INTERIM ACTION" WAS AVAILABLE TO THE RAILROADS TO AVOID THESE ADVERSE CONSEQUENCES 38

III. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE FILED RATE DOCTRINE 40

CONCLUSION 44

TABLE OF AUTHORITIES

Cases

	PAGE
American Broadcasting Cos. v. *FCC*, 643 F.2d 818 (D.C. Cir. 1980)	37
Arkansas Louisiana Gas Co. v. *Hall*, ____ U.S. ____, 101 S.Ct. 2925 (1981)	19, 37, 40-43
Arizona Grocery Co. v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932)	13, 38-39
Arrow Transp. Co. v. *Southern Ry. Co.*, 372 U.S. 658 (1963)	17, 20-28
ASARCO, Inc. v. *OSHA*, 647 F.2d 1 (9th Cir. 1981)	34
Atlantic Coast Line R.R. Co. v. *Florida*, 295 U.S. 301 (1935)	35
Atchison, T. & S.F. Ry. Co. v. *Wichita Board of Trade*, 412 U.S. 800 (1973)	*passim*
Burlington Northern Inc. v. *United States*, 555 F.2d 637 (8th Cir. 1977)	4
City of Cleveland v. *FPC*, 525 F.2d 845 (D.C. Cir. 1976)	43
Clark v. *Uebersee Finanz-Korp.*, 332 U.S. 480 (1947)	37
Consolidated Rail Corp. v. *National Association of Recycling Industries, Inc.*, 449 U.S. 609 (1981)	*passim*
Davis v. *Portland Seed Co.*, 264 U.S. 403 (1924)	41
FPC v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956)	37
Long Island R.R. Co. v. *Aberdeen & Rockfish R. Co.*, 439 U.S. 1 (1978)	21
Lowden v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939)	40-41
National Association of Recycling Industries, Inc. v. *ICC*, 627 F.2d 1328 (D.C. Cir. 1980)	24
Pennsylvania Ry. Co. v. *International Coal Mining Co.*, 230 U.S. 184 (1913)	41-42
San Antonio, Texas v. *Burlington Northern Inc.*, 650 F.2d 49, *clarified*, 652 F.2d 422 (5th Cir. 1981)	15, 25, 39

PAGE

San Antonio, Texas v. *United States*, 631 F.2d 831 (D.C. Cir. 1980) ..... *passim*

San Antonio, Texas v. *United States*, 655 F.2d 1341 (D.C. Cir. 1981) ..... *passim*

Southern Pacific Transportation Co. v. *Commercial Metals Co.*, 50 U.S.L.W. 4442 (U.S. April 27, 1982) 40, 43

Southern Ry. Co. v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979) 12, 21

United States v. *Morgan*, 307 U.S. 183 (1939) 36

United States v. *SCRAP*, 412 U.S. 669 (1973) 21-28

United States v. *Western Pacific R. Co.*, 352 U.S. 59 (1956) .. 31

United Steelworkers of America v. *Marshall*, 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 3148 (1981) 34

Western Oil & Gas Ass'n v. *EPA*, 633 F.2d 803 (9th Cir. 1980) 34

ICC Proceedings

Acme Peat Products, Ltd. v. *Akron, Canton & Youngstown R. Co.*, 293 I.C.C. 510 (1954) 41

Annual Volume Rates on Coal—Wyoming to Flint Creek, 361 I.C.C. 533 (1979) 6

Dewey Portland Cement Co. v. *Atchison, T. & S.F. Ry. Co.*, 188 I.C.C. 97 (1932) 41

Kansas City Fuel Oil Co. v. *Atchison, T. & S.F. Ry. Co.*, 210 I.C.C. 134 (1935) 41

San Antonio, Texas v. *Burlington Northern, Inc.*, 335 I.C.C. 405 (1976) *(San Antonio I)* ..... *passim*

San Antonio, Texas v. *Burlington Northern, Inc.*, 359 I.C.C. 1 (1978) *(San Antonio II)* ..... *passim*

San Antonio, Texas v. *Burlington Northern Inc.*, 361 I.C.C. 482 (1979) *(San Antonio III)* ..... *passim*

San Antonio, Texas v. *Burlington Northern Inc.*, 364 I.C.C. 887 (1981) 10, 15, 31, 34

Statutes

	Page
Interstate Commerce Act:	
49 U.S.C. § 15(a)	4
49 U.S.C. § 10327(g)	39
49 U.S.C. § 10704(a)	4, 27, 30
49 U.S.C. § 10707	27, 30
49 U.S.C. § 10761(a)	38, 40
49 U.S.C. § 10762	38
49 U.S.C. § 11705(b)(3)	10, 27, 30
49 U.S.C. § 11902	40
49 U.S.C. § 11903	40
Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1985	27
Judicial Code:	
28 U.S.C. § 2321(a)	22, 29
28 U.S.C. § 2324	22
28 U.S.C. § 2342(5)	22, 29
28 U.S.C. § 2349	22, 29

Regulations

49 C.F.R. § 1100.98(d)	40
49 C.F.R. § 1100.100	40

No. 81-1008

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BURLINGTON NORTHERN INC. AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The decision of the Court of Appeals is reported as *San Antonio, Texas* v. *United States,* 655 F.2d 1341 (D.C. Cir. 1981) (App. to Cert. Petn. A). An earlier decision which the Court of Appeals said it was clarifying is reported as *San Antonio, Texas* v. *United States,* 631 F.2d 831 (D.C. Cir. 1980) (App. to Cert. Petn. B). The orders of the Interstate Commerce Commission which were reviewed by the Court of Appeals in its earlier decision are reported at 361 I.C.C. 482 (1979) and 359 I.C.C. 1 (1978) (App. to Cert. Petn. C and D), and the 1976 Commission order which the court

in the decision below held had been revived is reported at 355 I.C.C. 405 (1976) (App. to Cert. Petn. E). The Commission's April 7, 1981, order directing respondent San Antonio to pay the filed tariff rate is reported at 364 I.C.C. 887 (1981) (App. to Cert. Petn. F).

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1981. The court denied a timely petition for rehearing with suggestion for rehearing en banc on August 26, 1981 (App. to Cert. Petn. G). The petition for certiorari was filed on November 24, 1981, and granted on March 1, 1982. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The statutes involved are the Interstate Commerce Act, 49 U.S.C. § 10101 et seq., and the Judicial Code, 28 U.S.C. §§ 2321(a), 2342(5), and 2349. Pertinent provisions of these statutes are set forth in the statutory appendix to the petition for writ of certiorari.

STATEMENT OF THE CASE

This case involves a decision of the United States Court of Appeals for the District of Columbia Circuit which holds unlawful filed tariff rates which the Interstate Commerce Commission has never determined to be unlawful. The basis for this ruling is the Court of Appeals' conclusion that when it vacated and remanded two Commission rate orders for further consideration by the Commission, the effect of this decision was to revive an earlier and much lower Commission rate order, and that the court was therefore empowered to declare unlawful filed tariff rates inconsistent with the "revived" order.

A. THE COMMISSION'S ORDERS IN *SAN ANTONIO I*, *SAN ANTONIO II*, AND *SAN ANTONIO III*.

The rate controversy underlying this case concerns the movement of approximately 3 million tons of coal per year in unit train service from coal mines located at Cordero Junction, Wyoming, to the municipal electric generating plant owned and operated by the City Public Service Board of San Antonio, Texas ("San Antonio"). Between October 14, 1976, and June 1, 1979, the Interstate Commerce ("Commission" or "ICC") served 3 rate orders governing this movement: *San Antonio Texas* v. *Burlington Northern, Inc.*, 355 I.C.C. 405 (1976) (*"San Antonio I"*) (App. to Cert. Petn. E); *San Antonio, Texas* v. *Burlington Northern, Inc.*, 359 I.C.C. 1 (1978) (*"San Antonio II"*) (App. to Cert. Petn. D); and *San Antonio, Texas* v. *Burlington Northern Inc.*, 361 I.C.C. 482 (1979) (*"San Antonio III"*) (App. to Cert. Petn. C). Each of these orders was issued during a period of rapid inflation and unprecedented changes in the standards applied by the Commission in regulating railroad rates.

San Antonio I was a rate order entered by the Commission in 1976 when petitioners Burlington Northern Inc. and Southern Pacific Transportation Co. ("the railroads") and San Antonio could not agree on a rate, and coal shipments were about to begin. Acting on a complaint filed by San Antonio, the Commission prescribed a rate of $10.93 per ton "so that the movement may commence." (App. to Cert. Petn. E-13.) The Commission derived this figure from comparisons of rates on similar movements, the costs of service, an assessment of the economic effect of the rate on particular communities, and a determination of the "public interest." (*Id.* at E-12.) Although the order was announced after the effective date of the Railroad Revitalization and

Regulatory Reform Act of 1976 ("4-R Act"), which fundamentally changed the traditional Rule of Ratemaking applied in railroad rate cases,[1] the Commission made no mention of the 4-R Act or the new Rule of Ratemaking in its decision.

The railroads petitioned for review in the United States Court of Appeals for the Eighth Circuit, contending, *inter alia,* that the Commission erred in not applying the provisions of the 4-R Act. The Court of Appeals rejected this argument, noting that the case had been commenced prior to the passage of the 4-R Act and that the Commission had not yet promulgated guidelines to implement the Act. *Burlington Northern Inc.* v. *United States,* 555 F.2d 637, 640 (8th Cir. 1977). However, the court agreed with the railroads that the 4-R Act had modified the ratemaking standards that had been applied by the Commission. *Id.* at 645, 647-48. Moreover, the court stated that "[t]he rate is a temporary one, developed to meet an emergency situation," and expressly indicated that the rate could be "modified on application to the Commission both before and after the new guidelines [of the 4-R Act] are developed and if circumstances warrant." *Id.* at 648.

Upon application by the railroads, the Commission reopened the proceedings and, after taking extensive evidence, issued a new order, *San Antonio II.* In that decision, the Commission indicated that it would deal with two

[1] *Compare* 49 U.S.C. § 15a (1970) (old Rule of Ratemaking, requiring Commission to insure service "at the lowest cost consistent with the furnishing of such service"), *with* 49 U.S.C. § 10704(a)(2) (West Supp. 1982) (new Rule of Ratemaking, requiring Commission to make "an adequate and continuing effort" to assist carriers in earning "a reasonable and economic profit or return (or both) on capital employed in the business").

issues: first, whether "modification of the previously prescribed rate" was warranted and, second, if modification was warranted, what the maximum rate level should be for the future. (App. to Cert. Petn. D-4.)

With respect to the first issue, the Commission had little difficulty finding that *San Antonio I* was too low and should be lifted. The Commission noted that the *San Antonio I* rate was below the average of comparable rates submitted by both the railroads *and* San Antonio. (*Id.* at D-7.) In addition, the Commission pointed out that *San Antonio I* did not take into account the new "ratemaking guidelines contained in the 4-R Act," which the Commission conceded were applicable to the movement. (*Id.* at D-12 — D-14.) For these two reasons, the Commission lifted its prior rate prescription. (*Id.* at D-20.)

With respect to the second issue, the Commission applied the new Rule of Ratemaking of the 4-R Act, and concluded that the maximum reasonable rate for the future would be $16.12 per ton. In so ruling, the Commission made extensive new cost findings and, as mandated by the Act and implementing regulations, allowed the railroads a higher rate of return to reflect the cost of equity capital and income tax expense as well as embedded debt. The Commission did not, however, make any provision for differential pricing—the practice of permitting rates to be set either below or above fully allocated costs within a "zone of reasonableness" to take into account differences in demand for service. Instead, after determining variable and fixed costs, and adjusting the rate of return to the newly-mandated "revenue need" level, the Commission set the maximum rate at a level exactly equal to fully allocated costs. (*Id.* at D-16.)

San Antonio and the railroads filed petitions for review challenging *San Antonio II* in the Court of Appeals for the District of Columbia Circuit; they also filed administrative appeals asking the Commission to revise its decision. Before the Court of Appeals considered the case, the Commission entered a third order, *San Antonio III*. In this decision, the Commission made further modifications in its cost determinations and, following a decision in another coal rate case decided at about the same time,[2] provided for a restricted measure of differential pricing — 7% above fully allocated costs. (App. to Cert. Petn. C-15 — C-17.) The Commission accordingly modified its *San Antonio II* order and raised the maximum rate ceiling to $17.23 per ton.

B. THE COURT OF APPEALS' REVIEW OF *SAN ANTONIO II* AND *SAN ANTONIO III*

San Antonio and the railroads amended their petitions for review in the D.C. Circuit to include the decision in *San Antonio III* as well as *San Antonio II*. The State of Texas and the Department of Justice also challenged these decisions.

In the Court of Appeals, the argument centered almost exclusively on the cost findings and ratemaking methodology underlying the Commission's new rate ceilings established in *San Antonio II* and *San Antonio III*. No one challenged the two specific findings relied upon by the Commission in *San Antonio II* in support of its decision to modify the "temporary" rate prescription in *San Antonio I*.

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[2] *Annual Volume Rates on Coal—Wyoming to Flint Creek*, 361 I.C.C. 533, 548-550 (1979).

Specifically, San Antonio contended that the Commission, in setting the new rate ceilings, had made numerous costing errors, should have relied upon rate comparisons, should have performed a funds flow analysis, and should not have allowed any differential pricing. (J. App. at 9-10.) For these reasons, San Antonio asserted that the Commission's orders should be vacated and remanded because they established a rate ceiling that was *too high*. San Antonio did not, however, challenge the reasons set forth by the Commission for lifting *San Antonio I*; nor did it ask the Court of Appeals to reinstate *San Antonio I*. Rather, San Antonio simply asserted, in the last sentence of its brief, what it believed the effect of a decision by the court vacating *San Antonio II* and *San Antonio III* would be:

> "Since there would then be no order of the Commission altering its original prescription, the *carriers tariffs would have to be amended* to reinstate the rate level prescribed in *San Antonio I*." (J. App. at 10, emphasis supplied.)

Likewise, the railroads in their briefs focused almost exclusively on the new rate orders in *San Antonio II* and *San Antonio III*. The railroads contended that the Commission's 7% differential pricing ceiling was unduly restrictive, given the traditional scope of the zone of reasonableness and the expansive policy of the new 4-R Act; they also challenged several of the Commission's cost determinations. In light of these errors, the railroads asked that the *San Antonio II* and *San Antonio III* orders be vacated and remanded because they set a rate ceiling which was *too low*. In their Reply Brief, the railroads briefly took note of San Antonio's assertion about the consequences of a judicial decision setting aside *San Antonio II* and *San Antonio III*. The railroads pointed out that such a ruling would not require that the tariffs be amended; rather, under

this Court's decision in *Atchison, T. & S.F. Ry. Co.*, v. *Wichita Board of Trade*, 412 U.S. 800, 828-29 (1973), such a ruling would leave the filed tariff rate undisturbed pending further action by the Commission. (J.App. at 12.)

In an opinion issued June 9, 1980, the Court of Appeals in effect granted the relief requested by both San Antonio *and* the railroads. As it stated in the concluding sentence: "With the foregoing guides to the Commission, we *vacate* the orders before us and *remand* for proceedings not inconsistent with this opinion." (App. to Cert. Petn. B-43, emphasis supplied.)

The "foregoing guides" referred to by the Court of Appeals included an exhaustive review of costing issues raised by the parties, wherein the court set aside two of the Commission's cost determinations as inadequately supported, suggested that the Commission reconsider a third, also upheld the Commission's decision not to rely on rate comparisons (*id.* at B-9 — B-11), and generally sustained its determination not to perform a funds flow analysis. (*Id.* at B-31 — B-36.) With respect to differential pricing, the court upheld the Commission's reliance on differential pricing in principle, but found that the particular 7% ceiling adopted by the Commission was "arbitrary and capricious" because not based "on a thorough analysis of the relevant interests." (*Id.* at B-39, B-41.)

In reaching the decision to vacate and remand the Commission's orders for further consideration, the Court of Appeals said nothing about the impact of its decision on the filed tariff rate established at the *San Antonio III* level. Thus, the court did not indicate whether it agreed with San Antonio that vacation of the Commission's orders meant the tariff would have to be amended, or whether it agreed

with the railroads that such a decision would have no effect on the filed tariff pending further action by the Commission.

C. THE DISPUTE OVER THE MEANING OF THE COURT OF APPEALS' MANDATE

After the Court of Appeals denied a petition for rehearing and issued its mandate on July 24, 1980, a controversy developed over the effect of its ruling. This controversy was to embroil the parties over the next ten months in various proceedings before the Commission, the United States District Court for the Western District of Texas, the Court of Appeals for the Fifth Circuit, and back again to the District of Columbia Circuit.

The railroads' position throughout this period remained the same. Relying on *Wichita Board of Trade, supra,* and later on *Consolidated Rail Corp.* v. *National Ass'n of Recycling Industries, Inc.,* 449 U.S. 609 (decided January 26, 1981), the railroads argued that the Court of Appeals' decision had set aside the Commission's *orders* in *San Antonio II* and *San Antonio III,* but had not disturbed the filed tariff *rate* permitted by those orders. In the railroads' view, the tariff rate was still in effect and would remain in effect unless and until the Commission, on remand, determined that the tariff rate (which was at the *San Antonio III* level)[3] was unreasonably high and ordered the railroads to file a reduced tariff. Under this interpretation, if the Commission ultimately found that the *San Antonio III* rate

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[3] For convenience, this brief refers to the "*San Antonio I* rate," the "*San Antonio II* rate," and the "*San Antonio III* rate," although throughout this time general rate increases (which are not at issue here) had been permitted to take effect by the Commission, thereby increasing these rates. For instance, as of July 24, 1980, the *San Antonio I* rate had increased from $10.93 per ton to $15.83 per ton, and the *San Antonio III* rate had increased from $17.23 per ton to $21.95 per ton.

was too high, San Antonio would be fully protected by the availability of reparations. 49 U.S.C.A. 11705(b)(3) (West Supp. 1982).

San Antonio's position shifted. San Antonio's initial position, as described in its brief to the D.C. Circuit, was that *San Antonio I* had been revived and the railroads were therefore required to amend their tariffs to reflect the drastically lower *San Antonio I* rate. Later, San Antonio discarded this position, and adopted the position that even if the tariff rate remained unchanged, San Antonio was entitled to pay for rail service at the lower *San Antonio I* level. Under this theory, if the Commission decided on remand that the allegedly revived *San Antonio I* rate was too low, San Antonio would reap a windfall gain and the railroads would suffer irreparable loss because the railroads would have no way under the Interstate Commerce Act to recover the difference between the *San Antonio I* rate and the rate the Commission ultimately established as the maximum reasonable level.

The Commission's position also changed during this period. The Commission initially was of the view that the D.C. Circuit's decision had revived *San Antonio I*, but that this result produced a "serious inequity" for the railroads by reinstituting a rate "that is several years out of date." (J.App. at 22, 23.) As the Commission recognized, this would "deprive the railroads of revenues which they cannot regain, since the Commission may not order shippers to retrospectively pay higher rates. . . ." (J.App. at 22.) Later, after this Court released its decision in *Consolidated Rail, supra*, the Commission changed its position and concluded that *San Antonio I* had not been revived at all. (App. to Cert. Petn. F-6, n.3.)

In brief compass, the following proceedings took place in late 1980 and early 1981 in an attempt to resolve the dispute over the effect of the Court of Appeals' June, 1980 decision.[4]

In October, 1980, San Antonio made its first and only effort to seek a Commission order requiring the railroads to amend their tariff; it asked the Tariff Integrity Board, an administrative arm of the Commission, to strike from its tariff files the existing tariff on the ground that it was inconsistent with the allegedly revived *San Antonio I*. (App. Unpub. Filings No. 1.) The Tariff Integrity Board rejected this request, noting in a letter that "although the court vacated the Commission's orders in this case, neither the court nor the Commission has, as yet, ordered an adjustment in the presently published tariff rate." (App. Unpub. Filings No. 3 at 1.) Although San Antonio had the right to appeal the Board's decision to the Commission, it did not do so; nor did it take any other action to obtain a final determinaton from the Commission on this issue.

After submitting several demand letters to San Antonio requesting full payment of the tariff charges, and receiving no satisfaction, Southern Pacific, the collecting carrier, in November, 1980 initiated a procedure which can be followed with respect to any delinquent shipper — it filed a tariff amendment which would have placed San Antonio on "prepay" status. (App. Unpub. Filings No. 4 at 4-5.) Under

[4] Although some of the filings and orders referred to below are technically not part of the record in this case, they are part of the public record of the Interstate Commerce Commission. For the convenience of the Court, and with the consent of all parties to this case, copies of these filings and orders have been lodged with the Clerk's Office as Petitioners' Appendix of Unpublished ICC Filings and Orders, July 1980 – May 1981 ("App. Unpub. Filings").

the proposed tariff amendment, which was filed on 3 days' notice, San Antonio would be denied credit and required to pay full tariff charges before the railroads would ship any further trainloads of coal from Wyoming to Texas.

San Antonio protested the proposed prepay tariff amendment and, acting without the opportunity for a response from Southern Pacific, the Commission (Division 2) ordered the proposal suspended. (J.App. at 13-15.)[5] In a brief decision accompanying the order, the Commission explained its rationale as follows: "In that our order in *San Antonio III* has been vacated by the Court of Appeals for the District of Columbia, we believe, that the rate SP [Southern Pacific] can lawfully charge for this service is the prescribed rate in *San Antonio I* as escalated by general increases." (J.App. at 14.) The Commission further noted, however, that the statutory standards applicable to railroad rates had recently been changed with the enactment of the Staggers Rail Act of 1980. The Commission accordingly suggested that the railroads file a new tariff seeking to justify the existing rate under the standards of the Staggers Act. (*Id.*)

The railroads' response to the Commission's suspension decision was twofold. First, the railroads filed a "Petition for Clarification of Mandate" with the Court of Appeals for the District of Columbia Circuit, asking the court to declare that its June 1980 decision had not, as the Commission then apparently believed, reinstated *San Antonio I*.

[5] A decision to suspend a proposed tariff is not a final determination of lawfulness, and hence is not judicially reviewable. *Southern Ry. Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 458 (1979). Moreover, the Commission's suspension decision affected only the proposed pre-pay amendment, not the base tariff. The base tariff remained in effect and continued to reflect a rate at the *San Antonio III* level.

(J.App. at 16-18.) This petition eventually resulted, some seven months later, in the decision here under review. Second, the railroads followed the Commission's suggestion and prepared and filed a new tariff (again setting forth a rate at the *San Antonio III* level), together with an extensive Justification Statement showing that the *San Antonio III* rate was reasonable under the new standards of the Staggers Act. (App. Unpub. Filings No. 7.)

San Antonio protested the filing of this new tariff, and demanded that it too be rejected or suspended. According to San Antonio, if *San Antonio I* had indeed been revived, then it could be set aside only after a "full hearing" (App. Unpub. Filings No. 8 at 6-8), meaning apparently something more than the procedure initiated by the railroads involving the filing of a justification statement with verified statements, followed by a protest with verified statements, followed by a reply to the protest.

On December 30, 1980, the Commission unanimously rejected San Antonio's request for suspension, and the new tariff (reflecting a rate at the *San Antonio III* level) became effective the next day. The Commission later issued a notice confirming this decision, in which it stated that the proposed tariff "will become effective without formal investigation on December 31, 1980." (App. Unpub. Filings No. 10.)

Despite this unambiguous action by the Commission, San Antonio continued to refuse to pay the filed tariff rate. San Antonio now asserted that under this Court's decision in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, 387-88 (1932), the supposedly revived *San Antonio I* rate prescription continued to govern the movement because the Commission, in denying its request to suspend the new tariff, had failed to conduct a "full hearing" or issue a "formal order" lifting *San Antonio I*. (App. Unpub. Filings No. 13, *passim*)

Faced with this continued intransigence, the railroads filed a petition with the Commission, requesting that the Commission formally order San Antonio to pay the tariff rate. (App. Unpub. Filings No. 12.) When the Commission did not promptly act on this request, the railroads filed another tariff amendment, this time on 30 days' notice, which again would have placed San Antonio on pre-pay status. (App. Unpub. Filings No. 14.) San Antonio protested this proposed tariff amendment, arguing once more that *Arizona Grocery* prohibited the Commission from setting aside the allegedly reinstated *San Antonio I* without a "hearing" or formal "order". (App. Unpub. Filings No. 16.) The Commission, however, voted unanimously *not* to suspend the pre-pay requirement, and issued a notice to this effect. (App. Unpub. Filings No. 18.)

San Antonio, however, was never to be placed on pre-pay status. Shortly before the pre-pay amendment was to become effective, San Antonio obtained an *ex parte* temporary restraining order and then a preliminary injunction from the United States District Court for the Western District of Texas prohibiting the railroads from requiring prepayment of tariff charges or charging any rate other than *San Antonio I*. The grounds for this injunction were the District Court's conclusions that the *San Antonio I* rate prescription had been revived; that *Arizona Grocery* prohibited the Commission from lifting the supposedly revived *San Antonio I* rate prescription without providing San Antonio a "hearing" and issuing an "order"; and that San Antonio would suffer irreparable harm if forced to resume paying the tariff rate subject to a later award of reparations.[6]

The railroads filed an interlocutory appeal from the District Court's injunction in the United States Court of

[6] The District Court's Memorandum Opinion is unreported.

Appeals for the Fifth Circuit. While this appeal was pending, the Commission, on April 7, 1981, issued an order in which it (1) formally declared that it no longer believed that *San Antonio I* had been revived; (2) ruled that *even if* the *San Antonio I* order had been revived, it was to be considered formally lifted, and San Antonio was to resume paying the filed tariff rate; and (3) reopened the San Antonio proceedings for further evidence as called for by the D.C. Circuit's decision of June, 1980. (App. to Cert. Petn. F-6, n.3, F-11.) Shortly thereafter, the Fifth Circuit issued a decision in which it reversed the preliminary injunction entered by the District Court. *San Antonio, Texas* v. *Burlington Northern Inc.*, 650 F.2d 49, *clarified*, 652 F.2d 422 (5th Cir. 1981). The Fifth Circuit held that, even assuming *San Antonio I* had been revived, the District Court had no jurisdiction to enjoin the railroads from collecting the filed tariff rate. 650 F.2d at 53. The Fifth Circuit also rejected San Antonio's challenge to the Commission's April 7 order (652 F.2d at 423), and that order thus became effective May 7, 1981.

On May 7, 1981, in compliance with the Fifth Circuit's order, San Antonio resumed paying the charges set forth in the applicable tariff on file with the Commission. Thus, as of that date, the controversy was resolved as to the immediate future.[7] Left unresolved, however, was whether San Antonio could keep the difference between the tariff rate and the *San Antonio I* rate level—a total of $19,887,179.96—which San Antonio had withheld from the railroads during the period from July 24, 1980, to May 7, 1981, or whether the railroads are entitled to those sums

[7] Of course, if the Commission should find in the reopened proceedings that the present tariff rate (at the *San Antonio III* level) is too high, San Antonio may obtain reparations for the period after May 7.

(subject to a possible future award of reparations to San Antonio in the reopened proceedings).

D. THE COURT OF APPEALS' CLARIFICATION OF MANDATE

The Commission and the railroads had kept the D.C. Circuit informed of developments taking place in the Western District of Texas and the Fifth Circuit, and before the Commission, and had also provided the Court with copies of this Court's decision in *Consolidated Rail Corp.* v. *National Ass'n of Recycling Industries, Inc.*, 449 U.S. 609, 612 (decided January 26, 1981), holding squarely that a reviewing court is "without authority" to determine the level of rates that may be charged pending reconsideration of a rate order by the Commission.

Nevertheless, in a decision issued June 30, 1981, the D.C. Circuit held that when it vacated the Commission's orders in *San Antonio II* and *San Antonio III*, the *San Antonio I* rate prescription was indeed revived, and filed tariff rates inconsistent with *San Antonio I* were therefore "unlawful." (App. to Cert. Petn. A.)

The Court of Appeals acknowledged that the issue was controlled by this Court's decisions in *Wichita Board of Trade, supra,* and *Consolidated Rail, supra,* which, the court stated, "made it crystal clear that we are without authority to determine interim transportation policy pending further ICC action after a decision of this court vacating an ICC order." (*Id.* at A-4.) However, the court interpreted those decisions as requiring a reviewing court "to restore the situation to the *status quo* before the vacated orders were issued." (*Id.* at A-2.) According to the court,

> "the *status quo* prior to the *San Antonio II* and *San Antonio III* orders is determined by the Commission's

> order in *San Antonio I*. The *San Antonio I* order was superseded for a time by the Commission's *San Antonio II* and *San Antonio III* orders, but with those orders vacated, *San Antonio I* did continue in force pending further ICC action.... Tariffs in excess of it have been therefore unlawful." (*Id.* at A-3.)

The Court of Appeals distinguished its earlier decision which had been reversed in *Consolidated Rail* on the ground that in that case, "we took affirmative action on our own to order that the rates be rescinded." (*Id.* at A-4.) Here, in contrast, the declaration of unlawfulness was "not the result of some action by this court, but the consequence of a pre-existing ICC order forbidding higher tariffs." (*Id.* at A-5 n.12.)

Finally, the court suggested that the railroads had no cause to complain about this result because "[s]uitable interim action which would protect the interests of the railroads has been and is available to the Commission..." (*Id.* at A-6.) The court did not explain what form of "interim action" was in fact available to the railroads.

SUMMARY OF ARGUMENT

In the decision below, the Court of Appeals declared filed tariff rates unlawful which have never been found unlawful by the Interstate Commerce Commission. This action cannot be reconciled with this Court's decisions in *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658 (1963) and its progeny, which establish the fundamental principle that only the Commission, not the courts acting under the guise of judicial review, may establish the level of rates to be charged by common carriers.

Here, as in *Atchison, T. & S. F. Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973), and *Consolidated Rail*

Corp. v. *National Ass'n of Recycling Industries, Inc.*, 449 U.S. 609 (1981), the Court of Appeals did not "reject outright" the maximum rate permitted by the Commission in *San Antonio III*. In reviewing the Commission's decisions, the Court of Appeals ordered the Commission to reconsider several costing issues, and to reconsider its 7% ceiling on differential pricing. In these circumstances, the Commission was free to find on remand that the *San Antonio III* rate level did not exceed (and indeed was below) the maximum reasonable level. Thus, the subsequent declaration by the court that any rate higher than *San Antonio I* would be "unlawful" directly interfered with the Commission's exclusive authority to establish rate policy.

It is of no consequence that the court here did not "enjoin" or "revoke" existing rates, but instead declared the filed tariff rate for the period from July 24, 1980, to May 7, 1981, "unlawful." Under the Interstate Commerce Act, the Commission has power to award reparations to shippers if rates are ultimately determined to be too high, but no power to order shippers to compensate carriers if rates are ultimately found too low. By declaring any rate higher than *San Antonio I* "unlawful," the Court of Appeals usurped the Commission's power to set rate policy for the period from July 24, 1980, to May 7, 1981.

The prior rate order in *San Antonio I* does not require modification of the foregoing principles. In its June, 1980 decision, the D.C. Circuit did not rule on the Commission's conclusion in *San Antonio II* that *San Antonio I* was too low and should be modified. Thus, when *San Antonio II* was vacated, it was vacated only "in part." The Commission's new rate ceilings were set aside, but its decision to modify *San Antonio I* by lifting the prior rate prescription re-

mained undisturbed. There was thus no basis for concluding that the *San Antonio I* rate prescription was revived.

Moreover, even if the Court of Appeals were correct in concluding that *San Antonio I* "did continue in force," it does not follow that the court's role was to return the parties to the status quo as it existed "*before* the vacated orders were issued." (App. to Cert. Petn. A-2, emphasis supplied.) This Court, in *Consolidated Rail*, did not require restoration of the status quo *before* the vacated order in that case was entered. *Consolidated Rail* and *Wichita Board of Trade* make clear that the function of a reviewing court is to preserve the Commission's exclusive authority to set maximum reasonable rates, not to restore whatever the court may consider the "status quo."

The decision below not only interferes with the Commission's exclusive authority to determine maximum reasonable rates, but it is also patently unfair to the railroads and undermines the ratemaking scheme established by the Interstate Commerce Act. Because the Commission could not make the railroads whole if the allegedly revived *San Antonio I* were ultimately found to be too low, the railroads stand to lose nearly $20 million. Moreover, a rule requiring carriers to roll back their rates to the last lawful rate order would impose a new form of "regulatory lag" making it difficult for carriers to keep up with inflation, and would impose an unwarranted penalty on a carrier's exercise of its right of judicial review. Contrary to the Court of Appeals' assertion, no "suitable interim relief" was available to the railroads to avoid these consequences.

Finally, the lower court's order violates the "filed rate doctrine." As this Court explained in *Arkansas Louisiana Gas Co.* v. *Hall*, ____ U.S. ____, 101 S. Ct. 2925 (1981), the

filed rate doctrine requires not only carriers and shippers, but also the courts, to adhere to the rates established in published tariffs filed with the Commission. By declaring duly filed tariff rates "unlawful," the Court of Appeals has violated this doctrine.

ARGUMENT

I. THE DECISION BELOW INTERFERES WITH THE INTERSTATE COMMERCE COMMISSION'S EXCLUSIVE AUTHORITY TO DETERMINE MAXIMUM REASONABLE RATES

A. The Court of Appeals' Decision Conflicts With The Principles Established By *Arrow, SCRAP, Wichita Board of Trade* and *Consolidated Rail*

This Court, in a line of decisions beginning with *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658 (1963), and culminating in *Consolidated Rail Corp.* v. *National Ass'n of Recycling Industries, Inc.*, 449 U.S. 609 (1981), has consistently held that the Interstate Commerce Commission has exclusive authority to determine the maximum reasonable level of rates, and that, pending a final determination of lawfulness by the Commission, courts have no power to establish transportation policy.

In *Arrow, supra,* rail carriers filed a proposed schedule of reduced rates which was protested by competing barge lines. The Commission suspended the proposal for seven months, the maximum period of suspension under the statute as of that time, but at the end of this period had not reached a decision as to the lawfulness of the new rates. The barge carriers sought an injunction in federal district court restraining the railroads from implementing the new rates until the Commission reached a decision. This Court held that the district court had no jurisdiction

to enter such an order. Noting the "close nexus between the suspension power and the Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates", 372 U.S. at 668, the Court held that Congress, in giving the Commission the power to suspend rates, "meant thereby to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief." *Id.* at 667.

The holding of *Arrow* was reaffirmed in *United States* v. *SCRAP*, 412 U.S. 669 (1973). There, a three-judge district court enjoined a general rate increase on the ground that the Commission, in declining to exercise its power of suspension, had violated the procedural requirements of the National Environmental Policy Act. This Court overturned the injunction on the authority of *Arrow*. The Court noted that "to grant an injunction in the present context, even though not based upon a substantive consideration of the rates, would directly interfere with the Commission's decision as to *when* the rates were to go into effect, and would ignore our conclusion in *Arrow* that 'Congress meant to foreclose a judicial power to interfere with the *timing* of rate changes which would be out of harmony with the uniformity of rate *levels* fostered by the doctrine of primary jurisdiction.'" 412 U.S. at 697-98, *quoting Arrow*, 372 U.S. at 668 (emphasis original).

Arrow and *SCRAP* establish conclusively that "where Congress has vested the Commission with authority to suspend rates pending final determination of their lawfulness, that power may not be exercised by a court." *Long Island R.R. Co.* v. *Aberdeen & Rockfish R. Co.*, 439 U.S. 1, 6 (1978). *See Southern Ry. Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 458-60 & nn. 11-12 (1979).

In *Atchison, T. & S.F. R. Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973), the Court extended this principle to

judicial review of a final rate order issued by the Commission. In *Wichita Board of Trade,* the Commission had entered an order approving certain charges for the inspection of grain while in transit. On review, a three-judge district court vacated and remanded this order because the Commission had failed to explain its departure from prior decisions involving such charges. The lower court further ordered that "the proposed charges are suspended and shall be ineffective until and unless otherwise ordered by the Court." 412 U.S. at 817.

A divided Court affirmed that portion of the lower court's order vacating the Commission's decision for lack of sufficient explanation (by a vote of 5-3), but reversed that part of the order suspending the proposed new charges pending further order of the court (by a vote of 7-1). All seven Justices who voted to reverse the suspension order agreed that the statute providing for judicial review of ICC rate orders did not authorize such an order. The statute[8] provided only that the court could enjoin, set aside, or suspend the *order* of the Commission. It did not "in itself include a power to enjoin the railroads from implementing a proposed new charge." 412 U.S. at 819; *see id.* at 829.

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[8] The order in *Wichita Board of Trade* was reviewed by a three-judge district court pursuant to 28 U.S.C. § 2324. This statute was repealed in 1975. P.L. 93-584, 88 Stat. 1918. The Court of Appeals' jurisdiction in the present case was based on 28 U.S.C. §§ 2321(a), 2342(5), and 2349. These sections, like § 2324, do not authorize a court to enjoin, set aside or suspend a proposed *rate*. They only authorize the reviewing court to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all . . . *final orders* of the Interstate Commerce Commission . . . ." 28 U.S.C. § 2342(5), emphasis supplied; *see also id.* § 2349(a).

The disagreement among the seven Justices related only to the existence of some nonstatutory authority for such an order. Four Justices thought that a reviewing court might in some circumstances have power to enjoin carriers from implementing a proposed charge as "ancillary to the general equitable powers of the reviewing court, and protective of its jurisdiction." 412 U.S. at 819 (Opinion of Marshall J., joined by Burger, C. J., Stewart and Blackmun, JJ.) Three Justices disagreed with this qualification, finding that the district court's suspension order was "flatly contrary to the will of Congress" and would therefore never be permissible. *Id.* at 828 (Opinion of White, J., joined by Brennan and Rehnquist, JJ.)

Notwithstanding this disagreement over the potential existence of an "ancillary power" to suspend, *all seven* Justices agreed that, on the facts presented, judicial suspension of the proposed new charges was fundamentally incompatible with the principles established by *Arrow*. Although in *Wichita Board of Trade*, unlike *Arrow*, the Commission had rendered a final decision, that decision had been vacated and remanded because the Commission had failed to explain adequately the basis of its departure from precedent. In effect, the lower court's order meant the Commission had to start over again, placing it in the same position it would have been in if there had been no final determination of lawfulness in the first place. In these circumstances, judicial interference with the level of rates would be just as disruptive as it would have been in *Arrow* and *SCRAP*. As Justice Marshall observed, "[w]hen a case is remanded on the ground that the agency's policies are unclear, an injunction ordinarily interferes with the primary jurisdiction of the Commission." 412 U.S. at 822.

This extension of *Arrow* to judicial review of final Commission orders was reaffirmed by the Court's unanimous

decision in *Consolidated Rail Corp.* v. *National Ass'n of Recycling Industries, Inc.*, 449 U.S. 609 (1981). In *Consolidated Rail*, the Commission had prescribed a maximum rate on recyclable materials equal to 180% of variable costs. In response to this order, rail carriers filed new tariffs containing rates up to the 180% level. The United States Court of Appeals for the D.C. Circuit vacated and remanded the Commission's order on the ground that the Commission had failed to offer sufficient justification for its choice of the 180% figure. *National Ass'n of Recycling Industries, Inc.* v. *ICC*, 627 F.2d 1328 (D.C. Cir. 1980). In a subsequent order clarifying its decision, the Court of Appeals further ruled that any increased rates filed by the railroads pursuant to the 180% ceiling "*must be revoked* until such time as the ICC issues a new determination of what rates are reasonable." *Id.* at 1340 (emphasis supplied).

This Court summarily reversed the order of the Court of Appeals revoking the higher rates pending further review. Relying on *Arrow*, *SCRAP*, and *Wichita Board of Trade*, the Court held:

> "While the Court of Appeals was not without power to order further proceedings to determine the propriety of the 180% ratio standard, the court stepped beyond the proper exercise of its power when it revoked rates implemented under the standard and enjoined any further increases toward the 180% level. The basis for these remedies was the court's conclusion that the Commission had failed to adequately support the choice of the 180% figure. That standard was not rejected outright; the court's opinion leaves open the possibility that the 180% ratio may eventually prevail.
>
> Under the above circumstances, there is no basis in our prior decisions for the revocation order or for the injunction against further increases." *Id.* at 612.

In sum, *Arrow, SCRAP, Wichita Board of Trade,* and *Consolidated Rail* establish without qualification that when the Commission has not made a final determination of the lawfulness of a rate, a court is "without authority" to dictate interim rate policy pending the Commission's decision. *Consolidated Rail,* 449 U.S. at 612. This principle applies whether the Commission has not yet made any determination of lawfulness, as in *Arrow* and *SCRAP,* or whether the Commission has made a determination of lawfulness which has been vacated and remanded by a reviewing court for further explanation or clarification of the Commission's action, as in *Wichita Board of Trade* and *Consolidated Rail.*[9]

The decision below fundamentally conflicts with the foregoing principles. Here, as in *Wichita Board of Trade* and *Consolidated Rail,* the statute providing for judicial review authorizes the court only to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of" the "final *orders* of the Interstate Commerce Commission"; it does not

[9] The underlying unity of these cases is illustrated by the decision of the United States Court of Appeals for the Fifth Circuit in *San Antonio, Texas* v. *Burlington Northern Inc.,* 650 F.2d 49, *clarified,* 652 F.2d 422 (5th Cir. 1981). Relying on *Arrow, SCRAP,* and *Consolidated Rail,* the Fifth Circuit held that even if *San Antonio I* were revived, the district court would have no jurisdiction to enjoin the railroads from collecting the filed tariff rate. In contrast, the D.C. Circuit, in the decision below, held that the alleged revival of *San Antonio I* gave the court authority to declare the filed tariff rate "unlawful." The D.C. Circuit would thus give a reviewing court power to do by declaratory judgment what a district court cannot do by injunction. Such a result is totally inconsistent with the rationale of *Wichita Board of Trade* and *Consolidated Rail* extending the principles of *Arrow* and *SCRAP* to judicial review of agency orders.

authorize the court "to determine the validity of" filed *rates*. Moreover, here, as in those cases, the Court of Appeals did not "reject outright" the Commission's decision in *San Antonio III*. On the contrary, the court approved the Commission's handling of several cost issues, remanded others for further consideration, and set aside the Commission's 7% differential pricing ceiling — *not* because the ceiling was either too high or too low, but because it was without "defensible rationale." (App. to Cert. Petr. B-39). Thus, as in *Consolidated Rail*, the Court of Appeals' decision here clearly left open "the possibility that the [*San Antonio III* rate] may eventually prevail." 449 U.S. at 612. Under these circumstances, the Court of Appeals was "without authority" to declare *San Antonio I* the maximum lawful rate from July 24, 1980, to May 7, 1981. *Id.*

Under this Court's decisions, the Court of Appeals could have ruled as it did only if the Commission had made a final determination that *San Antonio I* was the maximum reasonable rate for the period from July 24, 1980 to May 7, 1981. But the Commission has never made a final determination — indeed, has never made *any* determination at all — that the *San Antonio I* rate level represents the maximum reasonable rate for this period. *San Antonio I* was entered by the Commission on October 14, 1976, and established a "temporary rate" to meet an "emergency situation." The order was lifted on October 25, 1978, when the Commission issued *San Antonio II*. The only Commission determination of lawfulness which even arguably applied during the period from July 24, 1980 to May 7, 1981 is the decision in *San Antonio III* — a decision which was final when rendered but no longer represents a final determination because it has been vacated and remanded for reconsideration by the Court of Appeals.

It is of no significance that the lower courts in *Wichita Board of Trade* and *Consolidated Rail* "suspended" and "re-

voked" rates, whereas the Court of Appeals in the decision below declared the filed tariff rate to be "unlawful." Nor is it relevant that the court's decision relates to a period in the past (from July 24, 1980 to May 7, 1981) rather than to the rate currently being charged. Whether a court enjoins carriers from collecting the currently filed rate, or renders a declaratory judgment that filed rates for some period in the past not yet adjudicated by the Commission are "unlawful," the result is the same: the court, rather than the Commission, has determined the maximum reasonable level of rates.

Under the Interstate Commerce Act, there is a fundamental asymmetry in the Commission's power to make retroactive adjustments in rates. If the Commission finds on remand that the *San Antonio III* rate is unreasonably high, not only may it establish a different rate for the future, but it may also award San Antonio reparations for any period back to the issuance of *San Antonio II*. 49 U.S.C. §§ 10704(a)(1), 11705(b)(3) (West Supp. 1982). In contrast, the Commission is not empowered by the Act to order a shipper to reimburse a carrier that is prevented by a court from maintaining a tariff rate which is later determined to have been reasonable. *See SCRAP, supra,* 412 U.S. at 697. Thus, if a court declares *San Antonio I* to be the maximum lawful rate, and the Commission finds on remand that a higher rate would have been justified, there will be no way under the Act for the railroads to recover their lost revenues.[10]

[10] The Staggers Rail Act of 1980, Pub. L. No. 96-448, amended the Interstate Commerce Act by adding a "reverse refund" provision, 49 U.S.C. § 10707(d)(2), which provides in limited circumstances for refund to the carrier of the difference between a tariff rate suspended by the *Commission* and the amount actually collected by the carrier during the suspension. This provision does not apply where a *court* order requires the reduction and thus has no applicability here.

Given this asymmetry in the Commission's reparations power, it makes no difference whether the court "enjoins" or "revokes" an existing tariff rate, or declares that the tariff rate in effect for some period in the past was "unlawful." In either case, the court has substituted its judgment for that of the Commission, and usurped the Commission's authority to make the ultimate determination as to what the rate should be for this period.

B. The Prior Order in *San Antonio I* Does Not Modify The Principles Applicable To This Case

The Court of Appeals sought to avoid the clear holdings of *Arrow, SCRAP, Wichita Board of Trade,* and *Consolidated Rail* based on a flawed syllogism. This syllogism, when broken down into its constituent elements, contains the following four propositions:

(1) When the Court of Appeals vacated *San Antonio II* and *San Antonio III*, it thereby vacated every aspect of those orders, including that portion of *San Antonio II* which found that *San Antonio I* was too low and should be modified.

(2) Because the Court of Appeals vacated that portion of *San Antonio II* which found that *San Antonio I* was too low and should be modified, *San Antonio I*, by its own terms, "continue[d] in full force and effect until the further order of the Commission."

(3) Because *San Antonio I* continued "in force," the court was required "to restore the situation to the status quo *before* the vacated orders were issued," which in this case meant to restore the filed rate to the level of *San Antonio I*.

(4) Finally, even if this result seemed troublesome or unfair, the court was powerless to reach a contrary result because this would require "affirmative action" — something forbidden by *Wichita Board of Trade* and *Consolidated Rail.*

Each of these propositions is erroneous.

1. The Court Of Appeals Did Not Set Aside That Portion Of *San Antonio II* Which Found that *San Antonio I* Was Too Low And Should Be Lifted

There is no basis for concluding that the Court of Appeals set aside the Commission's determination that the *San Antonio I* rate prescription was too low and should be lifted. In *San Antonio II,* the Commission gave essentially two reasons in support of its decision to modify *San Antonio I:* first, that the *San Antonio I* rate was lower than the average rate on comparable movements, even calculated on the basis of San Antonio's evidence (App. to Cert. Petn. D-7); second, that the Commission had not considered the guidelines of the 4-R Act in adopting the rate prescription in *San Antonio I.* (*Id.* at D-12-D-14.) These findings were not challenged by any party on appeal. Although the Court of Appeals made a passing reference to the first of these findings in a footnote (App. to Cert. Petn. B-10, n. 25), there was no suggestion that it found the Commission had erred in determining that *San Antonio I* was too low and should be modified.

The statutes which establish the jurisdiction of the Court of Appeals over Commission rate orders, 28 U.S.C. §§ 2321 (a), 2342(5), 2349, provide that the court may enter a judgment "determining the validity of, and enjoining, setting aside, or suspending, in whole or *in part,* the order of the agency." *Id.* § 2349(a) (emphasis supplied). In its decision

of June 9, 1980, the Court of Appeals determined *only* that the Commission's new maximum rate ceilings in *San Antonio II* and *San Antonio III* were invalid because they lacked sufficient support. No one argued, and the court did *not* decide, that the Commission had acted improperly in concluding that the *San Antonio I* prescription should be lifted. Thus, in its decision of June 9, 1980, the court actually set aside the orders in *San Antonio II* and *San Antonio III* only "in part." It set aside the Commission's new rate ceilings, but it did not set aside the Commission's decision to lift its prior rate prescription order in *San Antonio I*.

When interpreted in this manner, the Court of Appeals' decision left *no* Commission rate prescription or ceiling in effect for the San Antonio movement—the same result reached under this Court's decisions in *Wichita Board of Trade* and *Consolidated Rail*.[11]

2. The Court Of Appeals Should Have Deferred To The Commission's Interpretation Of *San Antonio I*

The Court of Appeals next reasoned that, because the portion of *San Antonio II* holding that *San Antonio I* was modified had itself been vacated, "*San Antonio I* did continue in force pending further ICC action." (App. to Cert. Petn. A-3.) In support of this conclusion, the court referred to the Commission's statement in *San Antonio I* that the order would "continue in full force and effect until the

[11] The absence of a Commission rate order, of course, does not mean that the shipper is left without protection. Pending the issuance of a further rate order by the Commission on remand, the shipper is fully protected by the Commission's power to suspend or investigate any higher rates posted by the railroads, 49 U.S.C. § 10707 (West Supp. 1982); and the shipper is ultimately protected, if necessary, by the Commission's power to prescribe a new rate ceiling or award reparations. *Id.* §§ 10704(a)(1), 11705(b)(3).

further order of the Commission." (App. to Cert. Petn. E-14, *quoted at* App. to Cert. Petn. A-2.)

However, the statement in *San Antonio I* that the order would continue in force until "further order of the Commission" does not support the court's reasoning. This statement did *not* say that the order would remain in force until further order of the Commission and would be automatically revived if such further order was set aside on judicial review for any reason whatsoever. It said only until "further order of the Commission." *San Antonio II* was of course a "further order of the Commission" which did in fact lift *San Antonio I* for reasons which have never been set aside by a reviewing court.

Given what was at least an ambiguity in *San Antonio I*, the Court of Appeals should have deferred to the Commission's announced view that *San Antonio I* had not been revived; alternatively, the court should have remanded the matter to the Commission pursuant to the primary jurisdiction doctrine to obtain the Commission's considered interpretation of the current status of *San Antonio I*. See, *e.g.*, *United States* v. *Western Pacific R. Co.*, 352 U.S. 59 (1956). The Commission's views as to the alleged revival of *San Antonio I* had changed during the pendency of the petition for clarification of mandate. The Commission initially thought *San Antonio I* had been revived, but asked the Court of Appeals to modify its June, 1980 decision to specify that no such result was contemplated. In its April 7 order, the Commission stated that "[o]n further reflection" it no longer believed "that the court's decision vacating our *San Antonio II* and *III* orders had the necessary effect of voiding our decision to vacate the original *San Antonio I* prescription." (App. to Cert. Petn. F-6, n.3.)

Particularly in light of the Commission's changing views on the revival of *San Antonio I*, it was highly improper for the Court of Appeals to reach out for an interpretation of

San Antonio I that would produce a result diametrically opposite what the Commission believed to be proper. At the very least, the court should have sought further clarification from the Commission before declaring that *San Antonio I*, by its own terms, "did continue in force."

3. *Wichita Board Of Trade* And *Consolidated Rail* Do Not Require The Court To Restore The Status Quo Before The Rate Orders Were Issued

The Court of Appeals next reasoned that under *Wichita Board of Trade* and *Consolidated Rail*, its job was to restore the situation to the status quo as it existed "before the vacated orders were issued." (App. to Cert. Petn. A-2.) Given its previous conclusion that *San Antonio I* "did continue in force," the court found that the "*status quo* prior to the *San Antonio II* and *San Antonio III* orders is determined by the Commission's order in *San Antonio I*." (*Id.* at A-3.)

There is no support for the proposition that *Wichita Board of Trade* and *Consolidated Rail* require a reviewing court to "restore the status quo" as it existed *before* the vacated orders were issued. Indeed, the notion that the reviewing court must return the parties to the situation that existed *before* the orders were issued directly conflicts with the holding of *Consolidated Rail*. In that case, as here, the Commission issued a maximum rate order, and the rail carriers responded by filing new tariff rates at the prescribed levels. In order to restore the situation in *Consolidated Rail* to the status quo *before* the vacated order was issued, the court would have had to order the carriers *to revoke* these rate increases—which is precisely what this Court held the Court of Appeals had no authority to do. 449 U.S. at 612.

Wichita Board of Trade and *Consolidated Rail* make clear that the role of a reviewing court is not to return the parties to the situation *before* the orders were entered, but to preserve the Commission's exclusive authority to determine maximum reasonable rates. Thus, *Consolidated Rail* held that when the reviewing court has done no more than remand for further explanation, the court would intrude upon the Commission's function by revoking or suspending rate increases pending further consideration by the Commission. As the Court stated, "'[w]hen a case is remanded on the ground that the agency's policies are unclear, an injunction ordinarily interferes with the primary jurisdiction of the Commission.'" 449 U.S. at 612, *quoting Wichita Board of Trade, supra,* 412 U.S. at 822. Here, as in *Consolidated Rail,* the duty of a reviewing court is to preserve the Commission's authority to determine transportation policy—which means to leave the filed tariff rate undisturbed pending further decision by the Commission on remand.

4. The Court Of Appeals Was Not Compelled To Take "Affirmative Action" To Reach A Contrary Result

Finally, the Court of Appeals reasoned that it could not reach a different result without taking "affirmative action" forbidden by *Wichita Board of Trade* and *Consolidated Rail.* Specifically, the court stated that even if it "wished to permit the railroads to maintain their tariffs" it would have had "somehow to strike down the *San Antonio I* order, which was still outstanding and *not* before us for review." (App. to Cert. Petn. A-6.)

This does not follow at all. The court could have reached a different result by holding (a) that it had not vacated

the portion of *San Antonio II* modifying *San Antonio I;* or (b) that it would defer to the Commission's interpretation of the meaning of *San Antonio I;* or (c) that *Wichita Board of Trade* and *Consolidated Rail* did not compel it to restore the status quo as it existed before *San Antonio II* and *San Antonio III* were issued.[12] None of these steps would have entailed any greater "affirmative action" than a judgment declaring *San Antonio I* "revived" and filed tariff rates inconsistent with *San Antonio I* "unlawful."

II. THE DECISION BELOW IS PATENTLY UNFAIR TO THE RAILROADS AND DISRUPTIVE OF THE RATEMAKING SCHEME

A. The Court Of Appeals' Decision Represents a Potential Loss To The Railroads And A Windfall Gain To San Antonio Of Nearly $20 Million

The decision below means that the railroads stand to lose up to $20 million because of the alleged revival, in 1980, of a rate prescription issued as a "temporary" measure in 1976. As the Commission has noted, "there is little reason to believe that the *San Antonio I* rate prescription, which was established 5 years ago expressly as an interim measure to permit the traffic to begin moving, is supported either by current cost data or by current legal standards." (App. to Cert. Petn. F-7.) Nevertheless, if the decision below is permitted to stand, and the Commission

[12] Alternatively, the court could have preserved the Commission's exclusive authority to establish rate policy by modifying its decision of June 9, 1980, so as to remand but not vacate the Commission's orders in *San Antonio II* and *San Antonio III*. See, e.g., *United Steelworkers of America* v. *Marshall*, 647 F.2d 1189, 1311 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 3148 (1981); *ASARCO, Inc.* v. *OSHA*, 647 F.2d 1, 2-3 (9th Cir. 1981); *Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 813 (9th Cir. 1980).

finds in the reopened proceedings that *San Antonio I* is presently below a maximum reasonable level, the Commission would have no way to order San Antonio to pay the railroads the difference between the *San Antonio I* rate and whatever rate is eventually established as the maximum.

This Court has long recognized that ratemaking controversies should not be resolved in such a way as to impose windfall gains on one party and losses on another. For example, in *Atlantic Coast Line R.R. Co.* v. *Florida*, 295 U.S. 301 (1935), the question was whether a carrier which had collected rates pursuant to a rate order later set aside on judicial review was required to make restitution to shippers. This Court concluded that, at least where the Commission had subsequently reinstated its order and the order was then sustained on review, restitution was not required. The Commission order in *Atlantic Coast Line*, like the *San Antonio II* and *San Antonio III* orders, was vacated because "the findings of the Commission were incomplete and inadequate". 295 U.S. at 305. After further proceedings, the Commission made new findings and this time the order was upheld. In these circumstances, this Court rejected the notion that a court of equity should "make the carrier pay the price of the blunders of the commerce board in drawing up its findings". *Id.* at 314. The Court concluded that "restitution is without support in equity and conscience, whatever support may come to it from procedural entanglements". *Id.* at 312-13.

Here, San Antonio is asserting that the Court of Appeals, by declaring *San Antonio I* revived and the railroads' filed rates unlawful, can award San Antonio a huge windfall and penalize the railroads because the Court of Appeals *agreed* with the railroads' argument that the Commission had failed to provide adequate support for its decisions in *San*

Antonio II and *San Antonio III*. Such a result is totally inconsistent with the underlying rationale of *Atlantic Coast Line* that the ultimate resolution of a rate case remanded by a reviewing court to a regulatory agency should be based on "equity and conscience" rather than "procedural entanglements". *Accord, United States* v. *Morgan*, 307 U.S. 183, 190-98 (1939).

B. The Decision Below Would Disrupt The Ratemaking Scheme

The decision below also poses a serious threat to the integrity of the ratemaking scheme established by the Interstate Commerce Act. In a period of rising costs and rapidly changing regulatory standards, the Commission may frequently issue a series of rate orders reflecting different rates or charges. Under the Court of Appeals' ruling, whenever a subsequent-in-time rate order is set aside by a reviewing court, the carrier would be required to roll back its tariff to conform to the "last lawful" commission order, no matter how outdated that order might be, and with no provision for recovery of the revenues lost during the period of the tariff rollback.

The Court of Appeals' ruling thus *creates* a new version of "regulatory lag" which would make it extraordinarily difficult if not impossible for railroads to keep up with inflation. Once the Commission has established a maximum rate order, the carrier would have to secure not only an order from the Commission, but also the reviewing court's approval of that order. If the reviewing court disapproves the Commission's order for any reason, the rates will automatically bounce back to the level established under the original order, and the carrier will have to start all over again.[13]

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[13] The effects of the Court of Appeals' ruling would be felt not only by those carriers subject to the Interstate Commerce Act, but by

In light of the clear Congressional purpose in the 4-R Act and the Staggers Rail Act of 1980 to improve the financial health of the nation's railroads, the new form of regulatory lag introduced by the Court of Appeals' decision should be rejected. "To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote on the other." *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 489 (1947) (Douglas, J.)

C. The Decision Below Would Undermine The Right Of Railroads Or Other Regulated Entities To Obtain Judicial Review Of Agency Rate Orders

The decision below would not only disrupt the statutory ratemaking scheme, but would also impose an unwarranted burden on the rights of railroads or other regulated entities to obtain judicial review of agency rate orders. Under the Court of Appeals' ruling, if the Commission modifies an outdated rate order with another rate order which the carrier also considers unduly restrictive, the carrier faces a "Hobson's choice." If the carrier does not file a petition for review challenging the new order, then it must live with an order it considers improperly restrictive. But if it does file a petition for review, and the Court of Appeals

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many regulated industries. Several other regulatory statutes, including the Communications Act, the Federal Power Act, and the Natural Gas Act, are directly patterned after the provisions of the Interstate Commerce Act. See *Arkansas Louisiana Gas Co.* v. *Hall* ____ U.S. ____, 101 S.Ct 2925, 2933 n.7 (1981) (Natural Gas Act patterned on Interstate Commerce Act); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956) (Federal Power Act ratemaking provisions identical to Natural Gas Act and Interstate Commerce Act); *American Broadcasting Cos.* v. *FCC*, 643 F.2d 818, 820-22 (D.C. Cir. 1980) (Communications Act patterned on Interstate Commerce Act). Thus, the court's ruling could have a considerable disruptive effect on a wide variety of vital industries in which there is a strong public interest in the rapid and efficient adjustment of rates in response to changed economic circumstances or ratemaking standards.

grants its petition and *sets aside* the second order, the fruits of this "victory" could be a requirement that the carrier roll back its tariffs to the even lower, previous level. This threat could act as a powerful deterrent to the filing of appeals — including the most meritorious appeals — by railroads or other regulated entities.

At the same time, the Court of Appeals' ruling would create an undue incentive for shippers to challenge rate orders which modify earlier (and lower) orders. If a shipper files a petition for review, and it is granted even on technical or procedural grounds unrelated to the reasonableness of the rate, the shipper would receive as a bonus a mandated tariff rollback to the level established by the earlier order. The possibility of such a windfall gain would provide an incentive for the filing of nonmeritorious petitions for review by shippers.

D. No "Suitable Interim Action" Was Available To The Railroads To Avoid These Adverse Consequences

The Court of Appeals thought its decision would not be unduly burdensome or disruptive because the Commission could grant "[s]uitable interim action which would protect the interests of the railroads." (App. to Cert. Petn. A-6.) The court did not specify what sort of "interim action" it had in mind. In point of fact, there is no clearly authorized summary procedure which the railroads can invoke to set aside a rate order reimposed by action of a reviewing court.

One possible procedure — which, at the Commission's suggestion, was followed in this case — would be for the railroads to file a new tariff. 49 U.S.C. §§ 10761, 10762 (West Supp. 1982). However, when the railroads followed this suggestion and filed a new tariff in November, 1980, San Antonio strenuously contested the legality of this procedure. San Antonio argued that under *Arizona Gro-*

cery Co. v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932), the Commission could set aside the allegedly revived *San Antonio I* only after holding a "full hearing" which, in San Antonio's view, would apparently include the institution of a new adjudicatory proceeding complete with discovery and cross-examination.

As this case demonstrates, the tariff filing procedure cannot be considered an effective summary remedy. When the Commission declined to suspend the railroads' new tariff and it became effective December 31, 1980, San Antonio *refused* to pay the tariff rate. According to San Antonio, the supposedly revived *San Antonio I* prescription remained in effect until the Commission conducted a "full hearing" and issued a "formal order" lifting the order. (E.g., App. Unpub. Filings No. 13.) It was not until May 7, 1981, under the compulsion of a ruling by the Court of Appeals for the Fifth Circuit, that San Antonio acquiesced in paying the applicable tariff rate. Even then, the Fifth Circuit did not reach the merits of San Antonio's *Arizona Grocery* argument,[14] and the legality of this procedure remains the subject of controversy.

A second possible procedure would be for the railroads to petition the Commission to reopen and lift or modify the "revived" rate orde.. 49 U.S.C. § 10327(g) (West Supp. 1982). This procedure, however, would require the institution of a new Commission proceeding, including the filing of a petition to reopen, the filing of evidence by the parties, protracted consideration of that evidence by the Commission, and ultimately the issuance of a new decision. Under the Interstate Commerce Act and the Commission's regulations, such a petition to reopen would not be subject to

[14] The Fifth Circuit ruled that the Commission's April 7 order (dated April 3, 1981), which became effective on May 7, was not a "final order" subject to judicial review. *San Antonio, Texas* v. *Burlington Northern Inc.*, *supra*, 652 F.2d at 423.

any time limitations[15] and might take months or even years to resolve. Moreover, the decision to lift or modify would itself be subject to judicial review, and if set aside would presumably again result in reinstatement of the "revived" order.

In short, there is no satisfactory procedure available to the railroads which would mitigate the harshness of the Court of Appeals' decision.

III. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE FILED RATE DOCTRINE

The Court of Appeals not only exceeded its authority under *Wichita Board of Trade* and *Consolidated Rail*, but it also violated the "filed rate doctrine". Under the Interstate Commerce Act, where the filed rate doctrine "has its origins," *Arkansas Louisiana Gas Co.* v. *Hall*, ___ U.S. ___, 101 S.Ct. 2925, 2933 (1981), a "carrier may not charge or receive a different compensation for . . . transportation or service from the rate specified in the tariff. . . ." 49 U.S.C. § 10761(a) (West Supp. 1982). Indeed, the Act provides substantial civil and criminal penalties for charging or receiving amounts for transportation different from those set forth in the filed tariff. 49 U.S.C. §§ 11902 & 11903. (West Supp. 1982). As this Court recently observed, "a carrier has not only a right but also the duty to recover its proper charges for services performed." *Southern Pacific Transportation Co.* v. *Commercial Metals Co.*, ___ U.S.___, 50 U.S.L.W. 4442, 4444 (U.S. April 27, 1982); *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520-21

[15] Section 10327(g) provides that the Commission must take final action by the 120th day after granting a petition to reopen, but imposes no time limitation on when the Commission must grant such a petition. The Commission's regulations merely restate the time limitations of the statute. 49 CFR §§ 1100.98(d) & 1100.100 (1981).

(1939); *Pennsylvania Ry. Co.*, v. *International Coal Mining Co.*, 230 U.S. 184, 196-97 (1913).

Throughout the period in controversy in this case, the rate which appeared in the tariffs on file with the Commission was the *San Antonio III* rate. Nevertheless, beginning with shipments of coal delivered on July 24, 1980, and until May 7, 1981, San Antonio refused to pay the filed tariff rate, and instead remitted payments to the railroads at the lower *San Antonio I* rate level. San Antonio's recourse to self help during this period was clearly unlawful under the Act.[16]

"The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified." *Davis* v. *Portland Seed Co.*, 264 U.S. 403, 425 (1924).[17] If San Antonio believed that the filed tariff rate was unlawful (because the rate violated the allegedly revived *San*

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[16] In early 1981, the railroads, in reliance upon the filed rate doctrine, filed a complaint in the United States District Court for the Western District of Texas, seeking to recover the difference between the filed tariff rate and the amounts paid by San Antonio. This action has been held in abeyance pending this Court's decision in the instant case.

[17] San Antonio asserts that the filed rate doctrine does not apply when carrier tariffs "contravene ICC rate orders." Brief of Respondent San Antonio, Texas in Opposition at 15. This is simply incorrect. The ICC has repeatedly ruled that unless and until a published tariff rate is invalidated by the Commission upon a timely complaint, the shipper is obligated to pay the tariff rate, even if that rate is in violation of an outstanding rate prescription order. *Acme Peat Products, Ltd.* v. *Akron, Canton & Youngstown R. Co.*, 293 I.C.C. 510, 510-511 (1954); *Kansas City Fuel Oil Co.* v. *Atchison, T. & S.F. Ry. Co.*, 210 I.C.C. 134, 136 (1935); *Dewey Portland Cement Co.* v. *Atchison, T. & S.F. Ry. Co.*, 188 I.C.C. 97 (1932). As the Commission held in *Kansas City Fuel Oil Co., supra*, 210 I.C.C. at 136:

> "A rate published in a tariff on file with the Commission *even though in contravention of its order* would still be the legal rate." (Emphasis supplied.)

Antonio I order or for any other reason), it should have filed a complaint with the Commission, asking the Commission to order the railroads to reduce their tariff, and to award reparations for any unlawful overcharges. As this Court ruled in *Pennsylvania Ry. Co.* v. *International Coal Mining Co.*, 230 U.S. 184, 197 (1913):

> "The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. *If, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former, the right to apply to the Commission for reparation.*" (Emphasis supplied.)

Despite the ready availability of this administrative remedy, San Antonio never filed a complaint with the Commission[18] after July 24, 1980, asking the Commission to order the railroads to reduce their tariff.

In *Arkansas Louisiana Gas, supra,* this Court reaffirmed that the filed rate doctrine requires not only carriers and shippers, but also courts, to defer to the rates contained in tariffs filed with a regulatory commission. The issue there was whether a state court could award damages for breach of a natural gas supply contract, even though the rate specified by the contract was not reflected in the rate filed with the Commission. This Court held that, under the filed rate doctrine, the state courts could not give precedence to the contract rate over the filed rate. Noting that "the courts lack authority to impose a different rate than the one approved by the Commission," ___ U.S. ___, 101 S. Ct. at 2933-34, the Court found that a damage award "amounts to nothing less than the award

[18] San Antonio did petition the Commission's Tariff Integrity Board to strike the tariff, but failed to appeal to the Commission or take any other action when this petition was denied. *See* p. 11 *supra.*

of a retroactive rate increase based on speculation about what the Commission might have done had it been faced with the facts of this case." *Id.*

The Court of Appeals in this case, like the Louisiana Supreme Court in *Arkansas Louisiana Gas,* violated the filed rate doctrine. Throughout the period governed by the court's order, the published tariff on file with the Commission reflected the rate established in *San Antonio III.* The Court of Appeals, however, decreed that any rate higher than the *San Antonio I* level would be "unlawful." This was nothing more than speculation about what the Commission would have done if San Antonio had filed an administrative complaint challenging the published rate — speculation which, to judge by the Commission's own statements made to the Court of Appeals, was manifestly incorrect.

Moreover, by ruling that the published tariff rate was "unlawful," the Court of Appeals in effect endorsed San Antonio's unilateral decision to ignore the filed tariff rate and pay only what it chose to pay. The court thereby encouraged shippers who believe they have been charged unlawful rates to bypass the administrative procedures established by the Interstate Commerce Act, unilaterally reduce the charges they pay, and take their chances that they will be upheld in this action by a reviewing court. Such a procedure is totally contrary to the policy underlying the filed rate doctrine, which is to preserve " 'the agency's primary jurisdiction over the reasonableness of rates' " and to ensure " 'that regulated companies charge only those rates of which the agency has been made cognizant.' " *Arkansas Louisiana Gas, supra,* 101 S.Ct. at 2933, *quoting City of Cleveland* v. *FPC,* 525 F.2d 845, 854 (D.C. Cir. 1976). *See also Southern Pacific Transportation Co.* v. *Commercial Metals Co.,* ___ U.S. ___, 50 U.S.L.W. 4442, 4444 (U.S. April 27, 1982).

CONCLUSION

For all the foregoing reasons, the decision of the Court of Appeals should be reversed.

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May 15, 1982

Respondent's Brief

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Office - Supreme Court, U.S.
FILED
MAY 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1008

In the Supreme Court of the United States

OCTOBER TERM, 1981

BURLINGTON NORTHERN, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

The Interstate Commerce Commission, in successive decisions, set maximum reasonable rates on a railroad coal movement of approximately $11 in 1976, $16 in 1978, and $17 in 1979. The question presented in this case is whether, after vacating and remanding the latter two decisions as inadequately explained, the court of appeals may declare the existing tariff rate unlawful on the theory that the first of those rate decisions had been reinstated or revived.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement:	
A. The Commission's San Antonio rate cases	2
B. The court of appeals' remand decision	5
C. The present dispute over the San Antonio rate	5
D. Collateral litigation over the San Antonio rate	8
E. The challenged decision	11
Summary of argument	12
Argument:	
I. The court of appeals' decision violates settled principles forbidding judicial ratemaking	16
A. The court exceeded the scope of its authority by establishing an interim rate policy contrary to that of the Commission	16
B. The court erred in failing to consider the issue of irreparable harm to the railroads	29
C. The decision below undermines the ratemaking scheme prescribed in the Interstate Commerce Act	32
II. The court of appeals' decision violates the filed rate doctrine	34
Conclusion	40

TABLE OF AUTHORITIES

Cases:

Acme Peat Products, Ltd. v. *Akron, C. & Y. R.R.*, 293 I.C.C. 510	38
Arizona Grocery Co. v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370	26, 33
Arkansas Louisiana Gas Co. v. *Hall*, No. 78-1789 (July 2, 1981)	15, 35, 37

Cases—Continued Page

Armour & Co. v. *Louisiana Southern Ry.*, 190 F.2d 925, cert. denied, 342 U.S. 913 ..... 38, 39
Arrow Transportation Co. v. *Southern* Ry., 372 U.S. 658 ..... 18, 22
Atchison, T. & S.F. Ry. v. *Wichita Board of Trade*, 412 U.S. 800 ..... *passim*
Atlantic Coast Line R.R. v. *Florida*, 295 U.S. 301 ..... 13, 27, 28, 29, 30
City of Cleveland v. *FPC*, 525 F.2d 845 37
City of Piqua v. *FERC*, 610 F.2d 950 37
Consolidated Rail Corp. v. *National Association of Recycling Industries, Inc.*, 449 U.S. 609 ..... *passim*
Dewey Portland Cement Co. v. *Atchison, T. & S.F. Ry.*, 188 I.C.C. 97 38
Florida v. *United States*, 282 U.S. 194 27
Foreston Coal International v. *Baltimore & Ohio R.R.*, 349 I.C.C. 495, aff'd *sub nom. Island Creek Coal Sales Co.* v. *ICC*, 561 F.2d 1219 ..... 38, 39
Kansas City Fuel Oil Co. v. *Atchison, T. & S.F. Ry.*, 210 I.C.C. 134 38
Louisville & Nashville R.R. v. *Central Iron Co.*, 265 U.S. 59 36
Louisville & Nashville R.R. v. *Maxwell*, 237 U.S. 94 35-36
Lowden v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 ..... 15, 35, 36
Maine Public Service Co. v. *FPC*, 579 F.2d 659 37
Midstate Horticultural Co. v. *Pennsylvania R.R.*, 320 U.S. 356 35
Nashville Traffic Bureau v. *Louisville & Nashville R.R.*, 53 I.C.C. 37 39
Nashville Association of Recycling Industries, Inc. v. *ICC*, 627 F.2d 1328 21
New York, N.H. & H. R.R. v. *ICC*, 200 U.S. 361 35
Pennsylvania R.R. v. *International Coal Co.*, 230 U.S. 184 ..... 35, 36
Pittsburgh, C., C. & St. L. Ry. v. *Fink*, 250 U.S. 577 36
San Antonio v. *Burlington Northern, Inc.*, 650 F.2d 49, clarified, 652 F.2d 422 ..... 9, 11, 33

Cases—Continued Page

Southern Pacific Transportation Co. v. *Commercial Metals Co.*, No. 81-622 (Apr. 27, 1982) 15, 35, 36
Southern Ry. v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 22
Texas & Pacific Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 37
Texas & Pacific Ry. v. *Mugg*, 202 U.S. 242 36
United States v. *Morgan*, 307 U.S. 183 28
United States v. *SCRAP*, 412 U.S. 669 22
Wichita Board of Trade v. *United States*, 352 F. Supp. 365 ..... 18, 20

Statutes:

Interstate Commerce Act, 49 U.S.C. (Supp. III) 10101 *et seq.*:
49 U.S.C. (Supp. III) 10704(a)(1) 2, 26
49 U.S.C. (Supp. III) 10704(a)(2) 3
49 U.S.C. (Supp. III) 10707 .....15, 35, 36
49 U.S.C. (Supp. III) 10707(d) 20
49 U.S.C. (Supp. III) 10709 3
49 U.S.C. (Supp. III) 10761 5
49 U.S.C. (Supp. III) 10761(a) 15, 34
49 U.S.C. (Supp. III) 11701(b) 15, 35, 36, 39
49 U.S.C. (Supp. III) 11705(a) 8
49 U.S.C. (Supp. III) 11705(b)(3) 15, 35
49 U.S.C. (Supp. III) 11705(d)(1) 9
49 U.S.C. (Supp. III) 11902 34
49 U.S.C. (Supp. III) 11903 34
Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 *et seq.* 3
Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 *et seq.* 10
28 U.S.C. 2349(a) 30

Miscellaneous:

1 I. Sharfman, *The Interstate Commerce Commission* (1931) 35

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BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-6) is reported at 655 F.2d 1341. An earlier, related opinion of the court of appeals (Pet. App. B-1 to B-43), not challenged here, is reported at 631 F.2d 831. The decision of the Interstate Commerce Commission (Pet. App. F-1 to F-11) is reported at 364 I.C.C. 887. The three rate decisions of the Commission (Pet. Apps. E-1 to E-27, C-1 to C-23, and D-1 to D-39) are reported at 355 I.C.C. 405, 359 I.C.C. 1, and 361 I.C.C. 482, respectively.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1981. A petition for rehearing was denied on August 26, 1981 (Pet. App. G-1 to G-2). The petition for a writ of certiorari was filed on November 24, 1981, and granted on March 1, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

A. The Commission's San Antonio Rate Cases

In May 1975 the City of San Antonio, Texas, filed a complaint with the Interstate Commerce Commission, asking the Commission to exercise its authority under 49 U.S.C. (Supp. III) 10704(a)(1) to prescribe a reasonable railroad rate for transportation of coal from Wyoming to San Antonio's newly constructed coal-fired generating facilities at Elmendorf, Texas. In its decision on that complaint, now known as *San Antonio I* (Pet. App. E-1 to E-27), the Commission prescribed a maximum rate of $10.93 per ton and ordered the carriers to maintain a tariff at a rate not exceeding that level "until the further order of the Commission" (*id.* at E-14). The Commission stated that its prescription was an interim measure necessary to get the coal moving at once, but that, as actual experience was acquired, the parties could petition for modification of the prescription (*id.* at E-13 to E-14).

The United States Court of Appeals for the Eighth Circuit affirmed the Commission's order, emphasizing that the "rate is a temporary one, developed to meet an emergency situation" and that the rate could "be modified on application to the Commission." *Burlington Northern, Inc.* v. *United States*, 555 F.2d

637, 648. The court rejected arguments that the Commission had erred in failing to apply certain provisions of the recently enacted Railroad Revitalization and Regulatory Reform Act of 1976 (the "4R Act"), Pub. L. No. 94-210, 90 Stat. 31 *et seq.*, reasoning that the proceeding before the Commission had commenced before passage of the new legislation (555 F.2d at 640) and that the Commission had not yet had an opportunity to implement various aspects of the legislation (*id.* at 647).[1]

In 1977, the railroads applied for reopening of the Commission proceeding. After taking new evidence, the Commission issued its second decision, *San Antonio II* (Pet. App. D-1 to D-39). The Commission found that a higher rate of $16.12 per ton would

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[1] The 4R Act mandated significant changes in the Commission's regulation of railroad rates. For example, Section 202 of the Act (now codified, as subsequently amended, at 49 U.S.C. (Supp. III) 10709) limited the Commission's jurisdiction over the establishment of maximum rates to situations in which the railroads charging a challenged rate have no effective competition for the transportation to which the rate applies (*i.e.*, where the railroads possess market dominance over the movement). Section 205 required the Commission to make "an adequate and continuing effort" to assist railroads in achieving sufficient revenues, and established specific ratemaking criteria. See 49 U.S.C. (Supp. III) 10704(a)(2). Because the proceeding before the Commission had been initiated prior to the passage of the 4R Act, the record before the Commission did not contain evidence or argument related to the provisions of the new legislation, and the Commission accordingly did not apply the 4R Act in determining a reasonable rate. Instead, the rate prescribed by the Commission was based on criteria and standards established in past Commission cases and on general national transportation policy goals. See Pet. App. F 10.

be lawful, and modified its *San Antonio I* maximum rate prescription accordingly (*id.* at D-18). Following the filing of various administrative appeals, the Commission issued its third rate decision, *San Antonio III* (Pet. App. C-1 to C-23), increasing the *San Antonio II* prescription to $17.23 per ton (*id.* at C-17). The substantial increase over the *San Antonio I* rate was in large measure attributable to the Commission's application of new ratemaking criteria established by the 4R Act (see *id.* at D-13 to D-14; *id.* at C-16).

Each of the Commission's specific maximum rate prescriptions was subject to general or "ex parte" increases, which were authorized by the Commission in order to permit the railroad industry to raise tariff rates across the board to meet higher costs attributable to inflation. Thus, for example, at the time of the Commission's *San Antonio III* decision (May 1979), the specific rate of $17.23 per ton prescribed in the Commission's decision (Pet. App. C-17) was subject to a general increase, making the maximum allowable rate as of that date $18.18 per net ton. By comparison, the allowable rate under the original *San Antonio I* prescription would have risen, through the application of general increases, to $13.10 as of that same date.[2] Those general increases are not directly at issue here. The Commission's *San Antonio II* and *III* decisions increased the *base* rate upon which subsequent general increases would be computed.

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[2] The current allowable *San Antonio I* rate, taking into account general increases to date, would be approximately $19, as compared to $26.16 under the *San Antonio III* prescription.

B. The Court of Appeals' Remand Decision

Petitions for review of the *San Antonio II* rate prescription as modified in *San Antonio III* were filed in the United States Court of Appeals for the District of Columbia Circuit by both San Antonio and the railroads. San Antonio and its supporting parties argued that the rate was too high. The railroads and their supporters argued that the rate was too low. Both San Antonio and the railroads asked the Court to vacate the Commission decisions.

Without expressing any opinion as to whether the Commission's maximum rate prescription was too high or too low, the court of appeals vacated the Commission's *San Antonio II* and *III* decisions and remanded the case to the Commission (Pet. App. B-1 to B-43), holding that these decisions were "arbitrary and capricious" and without "defensible rationale" (*id.* at B-39). In so holding, however, the court of appeals did not address that portion of the Commission's *San Antonio II* decision that had modified the maximum rate prescribed in *San Antonio I*, thus permitting the railroads to file rate tariffs above that amount.

C. The Present Dispute Over the San Antonio Rate

At the time of the court of appeals' remand order (June 9, 1980), the railroad tariff on file with the Commission set rates at the maximum level permitted by the Commission's *San Antonio III* decision.[3] Al-

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[3] The Interstate Commerce Act, 49 U.S.C. (Supp. III) 10761, states that railroads subject to the Commission's jurisdiction can only provide transportation service "if a rate for the transportation or service is contained in a tariff that is in effect * * *." In addition, the carrier "may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff * * *."

though that tariff remained on file with the Commission, San Antonio unilaterally reduced its payments to the *San Antonio I* level. It was at that point that the controversy now before this Court began.

Beginning in July 1980, San Antonio paid the railroads at the *San Antonio I* level rather than at the current tariff level, on the theory that the court of appeals' decision had revived the Commission's 1976 *San Antonio I* prescription by vacating the *San Antonio II* and *III* decisions. San Antonio did not resume paying the tariff rate until May 1981, approximately 10 months later, after the Commission vacated *San Antonio I* to the extent that it may have been revived by the D.C. Circuit's remand decision and specifically ordered San Antonio to pay the tariff rate. Petitioners assert (Pet. 8) that the difference between the tariff rate and the amounts actually paid by San Antonio during the period between July 1980 and May 1981 is $19,887,180.

In their first attempt to enforce payment of the tariff rate, the railroads, in November 1980, filed a new tariff that would have required San Antonio to pre-pay the tariff rate before coal service would be provided. A division of the Commission suspended that pre-payment tariff, stating its belief that the court of appeals' decision had rendered the earlier *San Antonio I* prescription effective, but it invited the railroads to file a new rate tariff and have the *San Antonio I* prescription lifted (J.A. 13-15).

Shortly thereafter, on November 22, 1980, the railroads filed a petition for clarification of the court of appeals' mandate, requesting the court to make clear that its decision did not suspend the effectiveness of the tariff rates on file with the Commission or require a rate rollback to the *San Antonio I* level

pending further proceedings on remand before the Commission (J.A. 16-18; see Pet. App. F-3). The railroads relied on *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973), for the proposition that the court of appeals could not, in remanding the Commission's rate decisions, also establish rates in the interim. The railroads suggested that the court clarify its mandate by specifying that its decision vacated only the Commission's determination of the new rate ceiling established in *San Antonio III*, but did not set aside that part of the Commission's decision in *San Antonio II* that lifted the interim rate prescribed in *San Antonio I*. San Antonio opposed the petition, arguing that when the court of appeals set aside the Commission decisions in *San Antonio II* and *III*, the *San Antonio I* rate was revived because there was no valid order of the Commission permitting a higher rate (see Pet. App. F-3).

The Commission initially took the position that, in the absence of a clarification to the contrary, restoration of the *San Antonio I* rate was a necessary consequence of the court of appeals' decision. The Commission pointed out, however, that such a result would be inequitable to the railroads because the rate prescription was years out of date and, moreover, would deprive the railroads of revenue that could not be regained because the Commission is without power to order shippers to pay higher rates retrospectively. Accordingly, the Commission urged the court of appeals to rule that its decision did not automatically reinstate *San Antonio I* (J.A. 19-24; see Pet. App. F-3 to F-4).

Subsequently, the Commission changed its position on the question whether the court of appeals' remand decision could legally have the effect of reviv-

ing the *San Antonio I* prescription (see Pet. App. F-1 to F-11). The Commission concluded that this Court's decisions in *Consolidated Rail Corp.* v. *National Association of Recycling Industries, Inc.*, 449 U.S. 609 (1981), and *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade, supra*, were controlling and required the court of appeals to confirm that it had not restored the *San Antonio I* rate (see Pet. App. F-6 n.3).[4]

D. Collateral Litigation Over the San Antonio Rate

While the railroads' petition for clarification was pending before the D.C. Circuit, the controversy over whether San Antonio was obligated to pay the tariff rate or the *San Antonio I* rate was litigated in other forums.

On November 26, 1980, the railroads filed a new tariff proposing to increase the existing tariff rate (which was then set at the *San Antonio III* level) by an amount authorized by the Commission in the latest general increase (see Pet. App. F-4). Over San Antonio's protest, the Commission voted unanimously not to suspend or reject the tariff. Although the tariff became effective on December 31, 1980, San Antonio nevertheless continued to pay the *San Antonio I* rate and filed a complaint in the United States District Court for the Western District of Texas seeking enforcement of the Commission's *San Antonio I* order.[5] The railroads responded by filing

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[4] This Court's *Consolidated Rail* decision was issued after the Commission and the other parties had filed their initial responses to the railroads' petition for clarification in the court of appeals.

[5] Under 49 U.S.C. (Supp. III) 11705(a), a person injured by a carrier's failure to obey an order of the Commission

a petition for clarification with the Commission on February 6, 1981, requesting a declaration from the Commission that, in deciding not to suspend the railroads' latest tariff, it necessarily had modified any outstanding rate prescription (*i.e., San Antonio I*). The railroads also filed a second pre-payment tariff with the Commission on March 5, 1981. The Commission voted not to suspend or reject that pre-payment tariff, again by unanimous vote. Shortly thereafter, the district court in Texas issued a preliminary injunction barring the railroads from conditioning service on pre-payment of charges or upon payment of a rate that did not conform to the *San Antonio I* rate level "until such time as the [Commission] enters a final, appealable Order based on the [railroads'] request for a tariff increase and for prepayment."[6]

On April 7, 1981, the Commission formally vacated the *San Antonio I* order to the extent that it may have remained viable after the D.C. Circuit's remand decision and ordered San Antonio to pay the current tariff rate (Pet. App. F-1 to F-11). The Commission explained (*id.* at F-7) that "there is little reason to believe that the *San Antonio I* rate prescription, which was established 5 years ago expressly as an interim measure to permit the traffic to begin moving, is supported either by current cost data or by current legal standards." In addition, the Commission noted that "there have been significant changes in the governing legal standards since

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may bring a civil action to enforce the Commission's order. Such an enforcement action may be brought in federal or state court. See 49 U.S.C. (Supp. III) 11705(d)(1).

[6] See *San Antonio* v. *Burlington Northern, Inc.*, 650 F.2d 49, 52 (5th Cir.), clarified, 652 F.2d 422 (1981).

the *San Antonio I* prescription was established" (*id.* at F-8), changes brought about by enactment of the 4R Act and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. The Commission found that the fact that it did not consider the ratemaking criteria in the new statutes in arriving at its *San Antonio I* prescription in 1976 was "a more than adequate basis" for declaring that rate invalid in 1981 (Pet. App. F-8). "Finally, and perhaps most importantly," the Commission concluded (*id.* at F-8),

> it would simply be unjust to the railroads to allow the *San Antonio I* prescription to remain in effect *pendente lite*; *i.e.*, until the Commission completes its reconsideration of the *San Antonio* rate controversy on remand. On remand, the Commission will determine what the maximum reasonable rate should have been, in accordance with the court's decision, for the period during which the vacated maximum rate prescriptions in *San Antonio II* and *III* were in effect. Should the Commission determine that the maximum reasonable rate for the period in controversy was in excess of the *San Antonio I* prescribed level, the railroads would, nevertheless, be unable to collect revenues at the level thus found to have been reasonable, if the *San Antonio I* prescription were considered to have continued validity during the period of the Commission's consideration on remand.
>
> By contrast, San Antonio's position is fully protected, even if forced to pay (*pendente lite*) a rate higher than that ultimately determined to have been the maximum reasonable rate, because the Commission can award San Antonio reparations under 49 U.S.C. [Supp. III] 11705(b)(3).

The United States Court of Appeals for the Fifth Circuit denied San Antonio's application to stay the Commission's order. *San Antonio* v. *Burlington Northern, Inc.*, 650 F.2d 49, clarified, 652 F.2d 422 (1981). The Fifth Circuit also vacated the preliminary injunction issued by the district court, holding that the district court lacked jurisdiction to enjoin the railroads from collecting the filed tariff rate. San Antonio began paying the tariff rate rather than the *San Antonio I* rate as of May 7, 1981, the effective date of the Commission's order vacating *San Antonio I*. The question that remains unresolved is whether San Antonio also was obligated to pay the higher tariff rate for the entire period that it was on file, subject to reparations should the Commission ultimately determine that the rate exceeded a reasonable maximum.

E. The Challenged Decision

In the decision here under review (Pet. App. A-1 to A-6), the court of appeals disposed of the railroads' November 22, 1980, petition for clarification of mandate by ruling that the rate prescription in *San Antonio I* had been revived by the court's decision vacating and remanding the rate prescriptions in *San Antonio II* and *III*. The court of appeals acknowledged that this Court, in *Consolidated Rail* and *Wichita Board of Trade*, had held that courts are barred from determining interim transportation policy or rates pending further action by the Commission following a judicial remand order (Pet. App. A-3 to A-5). In light of those decisions, the court of appeals characterized its role as merely restoring the status quo ante, without taking affirmative action on its own to set interim policy. Despite the fact

that the Commission had significantly modified the *San Antonio I* prescription in 1978 and 1979 and had contended in the court of appeals that it would be inequitable to revive it, the court held that, with the *San Antonio II* and *III* orders vacated, "*San Antonio I* did continue in force pending further ICC action" (*id.* at A-3). The court also declared (*id.* at A-6):

> Because the vacation of those orders revived the ICC's own *San Antonio I* order, our decision has had the practical effect of rendering unlawful the railroads' tariffs filed under the umbrella of the vacated *San Antonio II* and *III* orders.

Under this analysis, the court disclaimed responsibility for reviving the *San Antonio I* rate, stating that the result was a consequence of the Commission's pre-existing *San Antonio I* order (Pet. App. A-5 n.12). The court suggested that it had no choice in the matter because the *San Antonio I* order was not before it and thus could not be struck down (*id.* at A-6).

SUMMARY OF ARGUMENT

I.

A. The court of appeals in this case has revived an outdated ICC rate prescription and declared that tariff rates in excess of that prescription are unlawful. The decision below is contrary to this Court's decisions in *Consolidated Rail Corp.* v. *National Association of Recycling Industries, Inc.*, 449 U.S. 609 (1981), and *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973). It places the court of appeals in the position of establishing a rate level

that the Commission has found to be unsupported by current cost data and current legal standards. It also forecloses the Commission on remand from establishing any rate in excess of that level for the period at issue here, even if the Commission ultimately determines that the railroads were entitled to charge a substantially higher rate. The decision thus constitutes an unwarranted judicial intrusion into the Commission's primary jurisdiction under the Interstate Commerce Act.

The court below sought to avoid the application of *Consolidated Rail* and *Wichita Board of Trade* by insisting (Pet. App. A-5 n.12) that, having issued *San Antonio I* in 1976, the Commission, and not the court, was responsible for the court's finding that the current tariff rates were "unlawful" (*id.* at A-3). But this explanation rests on the faulty premise that, once the superseding *San Antonio II* and *III* orders were vacated, "*San Antonio I* did continue in force pending further ICC action" (*ibid.*). The court of appeals' theory that *San Antonio I* automatically was "revived" by virtue of the vacation and remand of the superseding rate orders is without support in the Interstate Commerce Act or the decisions of this Court.

B. Moreover, the court of appeals reached an incorrect result by failing to consider the equities of this case. See *Atlantic Coast Line R.R.* v. *Florida*, 295 U.S. 301 (1935). As the Commission pointed out (Pet. App. F-8), the railroads could be irreparably harmed by reinstatement of the *San Antonio I* prescription because they would have no means of obtaining compensation if the Commission determines on remand that the maximum reasonable rate for

the period in question was above the *San Antonio I* level. On the other hand, because the Commission is empowered to award reparations, if San Antonio were required to pay the higher tariff rate for that period its position would be fully protected in the event that the Commission finds that the tariff rate was too high.

This inequitable result could easily have been avoided by construing the court of appeals' remand decision as having vacated *San Antonio II* and *III* only in part, and not disturbing the unchallenged portion of the *San Antonio II* decision that had lifted the *San Antonio I* rate ceiling. In the alternative, if any uncertainty existed as to whether the Commission intended its 1976 *San Antonio I* rate prescription to remain in force in the period in question, the court should have remanded this case to the Commission to construe its own order.

C. Finally, the court of appeals' decision undermines the ratemaking scheme under the Interstate Commerce Act by requiring a nonrecoverable rate rollback whenever a Commission order modifying a prior rate prescription is vacated and remanded by a reviewing court. Contrary to the court's suggestion, the Commission is not in a position to take suitable interim action to protect the interests of the railroads in such a situation. When an outdated prior Commission prescription is "revived" in the manner required by the court's holding, the Commission cannot take effective action to prevent irreparable injury to the railroads. The interests of carriers cannot be fully protected if obsolete rate prescriptions, entered years before in a substantially different economic and

legal environment, are subject to automatic reinstatement as the court below held.

II.

Even if the court of appeals' "revival" theory were correct, the result below is contrary to the filed rate doctrine, "which forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co.* v. *Hall*, No. 78-1789 (July 2, 1981), slip op. 5.

The Interstate Commerce Act unambiguously provides that a "carrier may not charge *or receive* a different compensation for * * * transportation or service than the rate specified in the tariff * * *." 49 U.S.C. (Supp. III) 10761(a) (emphasis added). Under the Act, a shipper may challenge a rate believed to be unlawful or unreasonable by filing a complaint with the Commission, which is authorized to order refunds or reparations. 49 U.S.C. (Supp. III) 10707, 11701(b), 11705(b)(3).

For many years, this Court has consistently construed these provisions of the Act (and their predecessors) as requiring carriers to collect, and shippers to pay, the filed tariff rate. See, *e.g.*, *Southern Pacific Transportation Co.* v. *Commercial Metals Co.*, No. 81-622 (Apr. 27, 1982), slip op. 7; *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520-521 (1939). The decision below violates this established rule. It sanctions the actions of San Antonio, which, for a ten-month period, refused to pay the railroads the amount prescribed in their currently filed tariffs.

ARGUMENT

I

THE COURT OF APPEALS' DECISION VIOLATES SETTLED PRINCIPLES FORBIDDING JUDICIAL RATEMAKING

A. The Court Exceeded The Scope Of Its Authority By Establishing An Interim Rate Policy Contrary To That Of The Commission

At the time of the court of appeals' remand decision, the railroads had on file with the Commission tariffs permitting them to charge the maximum allowable rates prescribed by the Commission in *San Antonio III*. In vacating the Commission's *San Antonio II* and *III* orders, the court of appeals did not conclude that the rates prescribed in those orders were in excess of a maximum reasonable rate for the San Antonio coal movements. Instead, the court simply ruled that the Commission's decisions in *San Antonio II* and *III* were inadequately explained in certain respects. It thus was open to the Commission on remand to find that the *San Antonio III* rate was perfectly reasonable.

In its ruling clarifying its earlier mandate, however, the court of appeals expressly declared "unlawful" (Pet. App. A-3) the railroads' tariff rates that had remained on file with the Commission following the court's remand decision. The court's declaration invalidating the filed rates rested on the faulty premise that the vacation of *San Antonio II* and *III* necessarily reinstated the outdated *San Antonio I* prescription. The effect of the court's action was to establish a maximum rate substantially below that set by the railroads in their tariffs, even though the Commission—the body primarily responsible for establishing transportation rate policy—has not

found the railroads' tariff rates unlawful, but rather has stated unequivocally that the railroads' latest tariffs should remain in force pending the Commission's final determination on remand concerning the lawfulness of the tariff rates.

The decision below is contrary to the teaching of this Court's decisions in *Consolidated Rail Corp.* v. *National Association of Recycling Industries, Inc.*, 449 U.S. 609 (1981), and *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973). It places the court in the position of establishing a rate level that the Commission has found to be unsupported by current cost data and current legal standards. It also forecloses the Commission, in the remanded proceeding, from establishing any rate in excess of that level even if the Commission ultimately determines that the railroads were entitled to collect a substantially higher rate. The decision thus constitutes a judicial intrusion into the Commission's primary jurisdiction under the Interstate Commerce Act. By creating the possibility that, whenever a Commission rate decision is set aside for whatever reason, a prior prescription made years before in a substantially different economic and legal environment may be revived, the decision below impedes the Commission's performance of the ratemaking responsibilities entrusted to it by Congress.

1. In *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade, supra*, this Court reversed an order issued by a three-judge district court enjoining rail rate increases that had been filed pursuant to a remanded ICC rate standard. The Commission had approved railroad tariffs imposing separate charges for inspection of grain shipments while in transit. The lower court remanded to the Commission for further pro-

ceedings, holding that the Commission had not adequately justified its failure to follow its own long established rule that it would not allow a separate charge for the service, previously performed as part of the line-haul rates, without a demonstration by the railroad that the line-haul rates were insufficient to cover the total transportation service. *Wichita Board of Trade* v. *United States*, 352 F. Supp. 365, 368-369 (D. Kan. 1972). In addition to remanding the case, however, the district court also ordered that "[t]he proposed charges are suspended and shall be ineffective until and unless otherwise ordered by [the court]." *Id.* at 369.

This Court, by a 5-3 vote, sustained the remand to the Commission. *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade, supra*, 412 U.S. 806-817 (plurality opinion); *id.* at 826 (opinion of Douglas, J.). But the Court reversed t' injunction by a 7-1 margin. *Id.* at 817-826 (plurality opinion); *id.* at 828-829 (opinion of White, J.). Although the plurality believed that a court ordering a remand possesses sufficient power to enjoin new rates as "ancillary to the general equitable powers of the reviewing court, and protective of its jurisdiction" (*id.* at 819),[7] it concluded that "[w]hen a case is remanded on the ground that the agency's policies are unclear, an injunction ordinarily interferes with the primary jurisdiction of the Commission." *Id.* at 822 (footnote omitted). As the plurality explained (*id.* at 820-821; footnote omitted):

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[7] Justice White (joined by Justices Brennan and Rehnquist), concurred in the reversal of the injunction, but expressed the view that the courts are without power to suspend or enjoin a proposed rate increase. 412 U.S. at 828-829, citing *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963).

National transportation policy reflects many often-competing interests. Congress has established an administrative agency that has developed a close understanding of the various interests and that may draw upon its experience to illuminate, for the courts, the play of those interests in a particular case. Cf. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922); *United States* v. *Western Pacific R. Co.*, 352 U.S. 59 (1956). Ordinarily, then, a court should refrain from expressing a preliminary view on what national transportation policy permits, before the ICC expresses its view. But when a court issues an injunction pending final determination, one important element of its judgment is its estimate of the probability of ultimate success on the merits by the party challenging the agency action. *Virginia Petroleum Jobbers Assn.* v. *FPC*, 104 U.S. App. D.C. 106, 110, 259 F.2d 921, 925 (1958). Depending on the type of error the reviewing court finds in the administrative proceedings, the issuance of an injunction pending further administrative action may indicate what the court believes is permitted by national transportation policy, prior to an expression by the Commission of its view. This is precisely what the doctrine of primary jurisdiction is designed to avoid. Cf. *Order of Conductors* v. *Pitney, supra; Locomotive Engineers* v. *M.-K.-T.R. Co.*, 363 U.S. 528, 533 (1960).

In addition, the plurality observed that judicial consideration of other factors relevant to the issuance of an injunction may interfere with the Commission's primary jurisdiction. 412 U.S. at 823. In the Interstate Commerce Act, "Congress allocated the benefit and harm of a suspension" by giving the Commission the exclusive authority to suspend rate increases.

Ibid. If the Commission decides to suspend the new rates, the carriers may not collect the increases for a period of up to seven months, and "[t]he income that they might have gained is lost to them forever." *Ibid.*[8] Even after the new rates go into effect, the Commission may order refunds or reparations if the increase is ultimately found unjustified. *Id.* at 823-824. In light of the remedial powers available to the Commission, the plurality concluded that "it is often quite unlikely that shippers will be irreparably damaged by the implementation of a rate increase." *Id.* at 824. In addition, the plurality noted, because Congress has charged the Commission in the first instance with weighing the various public and private interests to determine whether new rates are consistent with national transportation policy, judicial assessment of those interests in an injunction proceeding would in all likelihood intrude upon the primary jurisdiction of the Commission. *Id.* at 824-825.

Consolidated Rail Corp. v. *National Association of Recycling Industries, Inc.*, *supra*, presented a situation quite similar to that in *Wichita Board of Trade.* In that case, the D.C. Circuit reviewed a Commission

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[8] Since the decision in *Wichita Board of Trade*, the Interstate Commerce Act has been amended to rectify the inequity that resulted from the absence of a provision authorizing an award of reparations to a carrier. Under current law, when the Commission suspends a new railroad rate and that rate is later found to be reasonable, the carrier "shall" collect the difference between the original rate and the portion of the suspended rate found to be reasonable, plus interest. See 49 U.S.C. (Supp. III) 10707(d). That provision does not protect the railroads in this situation, however, because no exercise of the Commission's suspension power is involved here.

decision setting a maximum reasonable rate for recyclable commodities at 180% of variable costs. Finding that the Commission had failed to furnish adequate support and explanation for its selection of the 180% figure, the court of appeals vacated and remanded to the Commission. *National Association of Recycling Industries, Inc.* v. *ICC*, 627 F.2d 1328, 1339-1340 (D.C. Cir. 1980). In ordering the remand, however, the court went further and ruled that any increase made by the railroads in reliance on the Commission's prescription "must be revoked until such time as the ICC issues a new determination of what rates are reasonable." *Id.* at 1340.

This Court reversed summarily. It held that "[t]he authority to determine when any particular rate should be implemented is a matter which Congress has placed squarely in the hands of the Commission." 449 U.S. at 612. Thus, although the court of appeals was empowered to remand for further proceedings on the propriety of the rate standard, "the court stepped beyond the proper exercise of its power when it revoked rates implemented under the standard and enjoined any further increases toward the 180% level." *Ibid.* In reaching that conclusion, this Court emphasized that the court of appeals' decision did not foreclose the Commission from justifying the 180% standard in the remanded proceeding:

> Here, the court [of appeals] was dissatisfied with the Commission's justification for adopting the 180% standard, and the case was remanded for further proceedings which could either produce a new standard or clarify the basis for the 180% ratio. Such a posture provides no basis for either revoking or enjoining rate increases * * *.

449 U.S. at 613.

The decisions in *Consolidated Rail* and *Wichita Board of Trade* address the question whether courts or the Commission should determine interim transportation policy in the context of a remanded proceeding, the situation presented here. As indicated in *Consolidated Rail* (449 U.S. at 612), however, the rule of exclusive Commission authority in this context is consistent with this Court's resolution of jurisdictional questions in other, similar settings, where it is established that the courts are without jurisdiction to fix rail rates by injunctions or other means. Thus, in *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), the Court held that the district court could not enjoin a carrier from putting new rates into effect where the statutory rate suspension period had expired and the Commission had not made a final determination of the lawfulness of the new rates. Similarly, in *United States* v. *SCRAP*, 412 U.S. 669, 690-698 (1973), the Court ruled that the district court lacked power to issue an injunction suspending railroad rates for alleged violations of the National Environmental Policy Act of 1969, 42 U.S.C. 4331 *et seq.*, where the Commission had declined to suspend the rates. See also *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 458-460 (1979) (holding that a Commission decision not to investigate the lawfulness of a proposed rate increase—like a Commission decision not to suspend a proposed rate—is not judicially reviewable).

2. The court below paid lip service to this Court's decisions in *Consolidated Rail* and *Wichita Board of Trade* by acknowledging (Pet. App. A-4) that "the Supreme Court has made it crystal clear that [the courts of appeals] are without authority to determine

interim transportation policy pending further ICC action after a decision * * * vacating an ICC order." The actual holding below, however, is inconsistent with the rulings of this Court because it interferes with the primary jurisdiction of the Commission over transportation rate policy.

The Commission, in its decision vacating the *San Antonio I* prescription (Pet. App. F-1 to F-11), made clear its view as to the proper "interim transportation policy." It concluded that the railroads should not be restricted to the outdated *San Antonio I* rate level, which it found to be unsupported by either current cost data or legal standards (*id.* at F-7 to F-8).[9] Thus, the Commission ordered San Antonio to pay the existing tariff rate subject to reparations if the Commission ultimately determines

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[9] In that decision of April 7, 1981, cited by the court of appeals in its opinion (Pet. App. A-6 n.13), the Commission's determination as to the proper interim rate was prospective only; it did not purport to determine whether the *San Antonio I* rate had been revived following the court of appeals' decision because that question was then pending before the court (*id.* at F-6). Nevertheless, as the Commission explained to the court of appeals, the same considerations that led the Commission to conclude that the *San Antonio I* rate prescription had no continuing validity as of April 1981 are applicable to the period during 1980 and 1981 that is directly at issue here. For example, in prescribing the *San Antonio I* rate in 1976, the Commission did not have occasion to consider two major, subsequently enacted amendments to the Interstate Commerce Act, the 4R Act and the Staggers Rail Act of 1980. Both statutes contain provisions directly relevant to the Commission's ratemaking responsibilities in cases such as the *San Antonio* case. The Commission found that the fact that ratemaking criteria in the new legislation were not considered in arriving at its *San Antonio I* prescription in 1976 was a more than adequate basis for declaring the prescription invalid in 1981 (see Pet. App. F-8).

that rate to be in excess of a reasonable maximum (*id.* at F-8, F-11). By holding that its decision vacating *San Antonio II* and *III* had the effect of reinstating *San Antonio I* as the maximum rate prescription, the court of appeals imposed a rate policy different from that expressly established by the Commission.

Moreover, the holding below has effectively foreclosed the Commission, in the remanded proceeding, from approving any rate in excess of the *San Antonio I* rate for the period between July 1980 and May 1981. In this case, as in *Consolidated Rail* and *Wichita Board of Trade*, the lower court's remand decision left open the possibility that the Commission's vacated maximum rate standard might prevail. In its remand decision the court of appeals upheld the Commission with respect to several issues (Pet. App. B-9 to B-18) and found fault with the Commission's treatment of others (*id.* at B-19 to B-41), but nothing in the decision foreclosed the Commission from ultimately justifying and approving a rate at the *San Antonio III* level or at some other level, either higher or lower. The court "set aside the Commission's action" establishing a maximum rate because it concluded that the Commission's decision "provides no defensible rationale for the inclusion of the seven percent increment" (*id.* at B-39), and it directed the Commission on remand "to explain more fully its reasons for selecting a particular increment, if any, above fully allocated costs, making sure that its decision is based on a thorough analysis of the relevant interests" (*id.* at B-41). Those instructions have been rendered meaningless by the court of appeals' subsequent imposition of the *San Antonio I* rate ceiling for the period at issue here.

3. The court below sought to avoid the application of *Consolidated Rail* and *Wichita Board of Trade* by asserting (Pet. App. A-5 n.12) that, having issued *San Antonio I* in 1976, the Commission, and not the court, was responsible for the court's finding that the current tariff rates were "unlawful" (*id.* at A-3). But this analysis rests on the faulty premise that, once the superseding *San Antonio II* and *III* orders were vacated, "*San Antonio I* did continue in force pending further ICC action" (*ibid.*).

Neither precedent nor logic compels the conclusion that the vacation of a maximum rate decision as inadequately explained necessarily reinstates a prior prescription. Indeed, as the court of appeals itself recognized (Pet. App. A-5, quoting *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade, supra*, 412 U.S. at 818-819 (plurality opinion; footnote and citations omitted and emphasis added by the court of appeals)):

> The only consequence of suspending [a Commission rate order] is that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable. In an action for reparations, for example, the railroads could not gain any benefit from the purported Commission approval of the increases. * * *
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> *Carriers may put into effect any rate that the Commission has not declared unreasonable.* * * * Suspension of the Commission's order thus does not itself preclude the carriers from implementing a new rate.

Despite this recognition of the limited consequences of vacating and remanding a Commission rate decision, the court below held that *San Antonio I* had been revived. Moreover, the court independently declared (Pet. App. A-3) that railroad tariffs in ex-

cess of the earlier rate order were "unlawful." The effect of this ruling is precisely the same as if the court had directly enjoined railroad rates in excess of the *San Antonio I* level following its remand decision.

The court of appeals' "revival" theory finds no support in the Interstate Commerce Act or in the decisions of this Court. Indeed, the court below did not cite a single authority in support of its novel conclusion. San Antonio argues (Br. in Opp. 7, 12), however, that the result below was compelled by 49 U.S.C. (Supp. III) 10704(a)(1), which provides in pertinent part that "[w]hen a rate * * * is prescribed [by the Commission] under this subsection, the affected carrier may not publish, charge, or collect a different rate * * *." But San Antonio's citation of this statute begs the question at issue, which is whether a Commission rate prescription that has been modified and replaced by subsequent rate orders is subject to automatic reinstatement when the subsequent orders are vacated and remanded as inadequately explained.

Nor does *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932), support San Antonio's position. In that case the Court held that where the rates charged by a carrier conform to the maximum reasonable rate prescribed by the Commission, the Commission may not thereafter subject the carrier to reparations on the ground that the Commission's earlier finding of reasonableness was erroneous. The passage from the *Arizona Grocery* decision (284 U.S. at 387-388) on which San Antonio relies (Br. in Opp. 8) merely describes the procedures that a carrier must follow in order to modify a Commission rate prescription. It is undisputed that the railroads followed the proper procedures in petitioning the Com-

mission to issue *San Antonio II* and *III*, which modified the *San Antonio I* prescription and permitted the railroads to collect higher rates. But the question here is whether the railroads were required, by virtue of the vacation and remand of the Commission's later orders, to petition the Commission again for modification or vacation of the *San Antonio I* prescription. If the earlier prescription was not automatically revived, then the railroads quite obviously were under no obligation to take steps to set it aside and could continue to charge and collect the current tariff rate.

Finally, San Antonio relies (Br. in Opp. 6-7) on *Atlantic Coast Line R.R.* v. *Florida*, 295 U.S. 301 (1935), for the proposition that when a Commission rate decision is reversed, the effect is to reinstate a prior prescription. San Antonio's reliance on *Atlantic Coast Line* is misplaced. Indeed, the Court's holding in that case, which was based on an analysis of pertinent equitable considerations, supports our argument for reversal of the decision below. See pages 29-32, *infra*.

In *Atlantic Coast Line*, the Florida Railroad Commission had prescribed maximum rates for log movements within Florida. The Interstate Commerce Commission found those rates to be unlawfully low and prescribed higher rates which the railroads then charged. Before the ICC's order became effective, the Florida Commission issued a new order, providing that its prior order would be suspended "so long as [the] federal Commission's order should remain in force." 295 U.S. at 323 (Roberts, J., dissenting). The ICC's order later was reversed by this Court for insufficient factual findings. *Florida* v. *United States*, 282 U.S. 194 (1931). Subsequently, on new evidence and findings conforming to this Court's

earlier opinion, the Commission issued an order setting the maximum rates at the same level as before.

The sole issue addressed by the Court in *Atlantic Coast Line* was whether the shippers were entitled to restitution for charges collected by the carriers under color of the original Commission rate order that had been reversed for inadequate findings—that is, the difference between the ICC's rate order and the Florida Railroad Commission's rate order. After carefully weighing the equities, the Court held that the shippers were not entitled to restitution because "[w]hat was injustice at the date of the second order of the Commission [*i.e.*, the unreasonably low rates prescribed by the Florida Railroad Commission] is shown beyond a doubt to have been injustice also at the first." 295 U.S. at 316. Noting that "[a] complex of colorable right and procedural mistake has brought about a situation in which the equities of the carrier, if they are not protected by the court, will be unprotected altogether" (*ibid.*), the Court refused "to make the carrier pay the price of the blunders of the commerce board in drawing up its findings" (*id.* at 314). See *United States* v. *Morgan*, 307 U.S. 183, 195-196 (1939).

The Court in *Atlantic Coast Line* did not address the issue whether the Florida Railroad Commission rate prescription necessarily had been restored when the ICC's first order was set aside. In dissent, Justice Roberts, while describing the procedural background of the case, observed, in the passage relied upon by San Antonio (Br. in Opp. 7), that once the ICC's original order had been struck down, the prior prescription of the Florida Commission governed the rail movements in question. 295 U.S. at 324. It is elementary that such a passing reference

in a dissenting opinion has absolutely no precedential value. In any event, the Commission order at issue here (*San Antonio I*) differs substantially in its terms from the Florida Commission order in *Atlantic Coast Line*. Unlike *San Antonio I*, which provided that it would remain effective only "until the further order of the Commission" (Pet. App. E-14,) the Florida Commission's prescription in *Atlantic Coast Line* was suspended for only so long as the ICC's order "should remain in force." 295 U.S. at 323 (Roberts, J., dissenting). Thus, *San Antonio I* was, by its terms, an interim prescription that was effectively superseded by subsequent prescriptions, whereas the Florida Commission order was expressly made subject to automatic revival upon vacation of the subsequent ICC order.

B. The Court Erred In Failing To Consider The Issue Of Irreparable Harm To The Railroads

As we have shown, the holding of the court of appeals is not compelled by statute or legal precedent. Moreover, the court of appeals erred in failing to consider a most important factor: the possibility of irreparable harm to the railroads. The court did not even address what the Commission correctly identified (Pet. App. F-8) as the dispositive consideration—*viz.*, that the railroads could be irreparably harmed through reinstatement of the *San Antonio I* prescription but that, because of the Commission's power to award reparations, San Antonio's position would be fully protected if it were required to pay the higher tariff rate. The decision below is thus at odds with the guiding principle of *Atlantic Coast Line*. Resolution of a rate case that has been remanded to a regulatory agency

should be based on "equity and conscience" rather than "procedural entanglements." 295 U.S. at 312-313.

The inequitable result of the court of appeals' action could easily have been avoided by construing the court's earlier decision as having vacated the Commission's *San Antonio II* and *III* decisions only to the extent actually challenged, thus leaving intact that part of the Commission's 1978 *San Antonio II* decision—not directly attacked by the complaining parties or addressed by the court of appeals—that had lifted the *San Antonio I* rate ceiling.[10] As the Commission explained (Pet. App. F-6 n.3):

> Our decision in *San Antonio II* expressly modified the *San Antonio I* prescription and replaced it with, ultimately, the *San Antonio III* prescription. This, however, was merely a maximum rate prescription, and indeed the carriers were free (and urged by us) to file rates lower than the maximums prescribed. * * * The carriers themselves then filed tariffs conforming to the *San Antonio III* maximum rate prescription. We do not believe that the court's decision vacating our *San Antonio II* and *III* orders had the necessary effect of voiding our decision to vacate the original *San Antonio I* prescription. Accordingly, when the court vacated our *San Antonio II* and *III* orders, the court's decision did not, under the principles of *Wichita Board of Trade* and *Consolidated Rail*, have the effect of vacating the tariffs the carriers filed in response to those Commission orders.

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[10] Under 28 U.S.C. 2349(a), a court of appeals may set aside "in whole or *in part*, the order of the agency" (emphasis added).

Alternatively, the court below should have remanded to the Commission to construe its own order. The *San Antonio I* order provided, in relevant part, that "this order shall continue in full force and effect until the further order of the Commission" (Pet. App. E-14). In light of important intervening events—including the modification of *San Antonio I* by the Commission's *San Antonio II* and *III* orders and the Commission's vacation of *San Antonio I* following the court of appeals' remand decision—it is manifest that the Commission did not intend its 1976 *San Antonio I* order to "continue in full force and effect" in July 1980, when the D.C. Circuit's mandate took effect.[11] If any uncertainty

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[11] The Commission's original response to the controversy over the San Antonio rate following the court of appeals' remand decision might be interpreted as an expression of its intent that the *San Antonio I* prescription should govern. When the railroads filed their first pre-payment tariff, a division of the Commission suspended the tariff, stating its belief that the court of appeals' decision had rendered *San Antonio I* effective. And in its original response to the railroads' petition for clarification in the court of appeals, the Commission took the position that, in the absence of a clarification to the contrary, restoration of *San Antonio I* appeared to be a necessary consequence of the remand decision. However, in neither instance was the Commission interpreting its own 1976 order. Instead, the Commission was merely expressing its initial view as to the legal effect of the court of appeals' decision. In any event, after full consideration of the matter, and after reviewing the latest pronouncement of this Court on the subject at hand, the entire Commission concluded that its prior analysis of that legal issue was mistaken (Pet. App. F-6 n.3). The Commission did not anticipate that the court of appeals would rely on the Commission's own 1976 order to reach the result it did.

existed as to the Commission's intent, the court should have permitted the Commission to clarify its intent; instead, the court below summarily concluded (Pet. App. A-3) that "*San Antonio I* did continue in force." [12]

If the court of appeals had followed either of these alternative courses, the practical effect would have been that the railroads could collect the rates reflected in their current tariffs subject, of course, to reparations if the Commission were later to determine that those rates were excessive.[13] By failing to select one of these alternatives, the court below not only infringed the Commission's primary jurisdiction but also reached a patently inequitable result.

C. The Decision Below Undermines The Ratemaking Scheme Prescribed In The Interstate Commerce Act

By requiring a rate rollback whenever a reviewing court sets aside a Commission rate order modifying a prior rate order, the court of appeals has under-

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[12] The court of appeals inconsistently concluded, on the one hand (Pet. App. A-6), that because the *San Antonio I* order was not before it on review, the court could not strike it, and, on the other hand, that it could construe that same 1976 order to give it revived force and effect.

[13] Another possible solution would have been for the court of appeals simply to have remanded the decisions that it found inadequately explained to the Commission, without vacating the orders. In view of the options available to the court of appeals for avoiding irreparable injury to the railroads and interference with the Commission's jurisdiction, the court plainly erred in stating that the Commission, rather than the court, was responsible for restoring the *San Antonio I* order.

mined the scheme of regulation of railroad rates under the Interstate Commerce Act. The holding below would present no particular problem if, immediately upon remand of a Commission rate decision, the Commission could vacate summarily any obsolete rate prescription that might have been revived. But, as this case demonstrates, it may not be open to the Commission to act summarily in such a situation; affected parties often will contend that a "full hearing" is required in order to vacate a prescription, as is the case when the Commission prescribes a new rate (see Pet. App. F-8 to F-10).

In fact, during the period between July 1980 and May 1981, San Antonio argued before the Commission, in reliance on *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, *supra*, 284 U.S. at 387-388, that a new hearing was required before the *San Antonio I* ceiling could be lifted. Even after the Commission issued a lengthy opinion concluding that the 1976 *San Antonio I* prescription had no continuing validity in 1981 in light of current cost data and legal standards (Pet. App. F-7 to F-8) and ordered the prescription vacated, San Antonio nevertheless argued in the Fifth Circuit that the Commission's decision should be set aside for failure to accord San Antonio due process.[14] If San Antonio is correct that a full due process hearing is required

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[14] That due process issue has not been finally resolved. The Fifth Circuit held that the Commission's decision vacating *San Antonio I* was nonfinal and unreviewable; accordingly, the court did not pass upon San Antonio's due process argument. *San Antonio* v. *Burlington Northern, Inc.*, *supra*, 652 F.2d at 423.

in this situation, then carriers inevitably will suffer irreparable economic injury because of the substantial delays inherent in such procedures.

II

THE COURT OF APPEALS' DECISION VIOLATES THE FILED RATE DOCTRINE

From July 1980 to May 1981, San Antonio refused to pay the tariff rate on file with the Commission on the theory that the *San Antonio I* rate had been revived. San Antonio's refusal to pay the tariff rate continued, even after the Commission declined, on two separate occasions, to suspend tariff amendments filed by the railroads which mandated higher rates. Even if San Antonio's "revival" theory were correct, the holding of the court below, which in effect rewards San Antonio's unilateral decision to pay a rate other than the tariff rate on file with the Commission during the ten-month period at issue, cannot be squared with the "filed rate doctrine," an established regulatory rule that requires adherence to published tariffs by shippers and carriers alike.

The Interstate Commerce Act unambiguously provides that a "carrier may not charge *or receive* a different compensation for * * * transportation or service than the rate specified in the tariff * * *." 49 U.S.C. (Supp. III) 10761(a) (emphasis added). Indeed, the Act provides substantial civil and criminal penalties for a carrier's failure to file and publish its rates or tariffs, or for knowingly accepting or receiving payment below the tariff rate. 49 U.S.C. (Supp. III) 11902, 11903. If a shipper believes that a new or preexisting rate is too high, it may file a

complaint with the Commission, which is empowered to determine whether the rate is lawful and to order refunds or reparations. 49 U.S.C. (Supp. III) 10707, 11701(b), 11705(b)(3).

These statutory provisions form the basis for the filed rate doctrine, "which forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co.* v. *Hall*, No. 78-1789 (July 2, 1981), slip op. 5. As the Court recently explained (*id.* at 6), "[t]he filed rate doctrine has its origins in this Court's cases interpreting the Interstate Commerce Act * * *." The historic purpose of that Act was "to achieve uniformity in freight transportation charges, and thereby to eliminate the discrimination and favoritism that had plagued the railroad industry in the late nineteenth century." *Southern Pacific Transportation Co.* v. *Commercial Metals Co.*, No. 81-622 (Apr. 27, 1982), slip op. 7. See *Midstate Horticultural Co.* v. *Pennsylvania R.R.*, 320 U.S. 356, 361 (1943); *New York, N.H. & H. R.R.* v. *ICC*, 200 U.S. 361, 391-392 (1906). See also 1 I. Sharfman, *The Interstate Commerce Commission* 17-18 (1931).

Under the Act, therefore, it has long been established that "[t]he tariff, so long as it was of force, was * * * to be treated as though it had been a statute, binding as such upon Railroad and shipper alike." *Pennsylvania R.R.* v. *International Coal Co.*, 230 U.S. 184, 197 (1913). See *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939). Thus, without a properly filed change in rates, the parties cannot, even by contract, lawfully deviate from the currently published rate. See *Louis-*

ville & Nashville R.R. v. *Maxwell*, 237 U.S. 94, 97 (1915); *Texas & Pacific Ry.* v. *Mugg*, 202 U.S. 242 (1906).

In keeping with this system of uniform rates, "a carrier has not only the right but also the duty to recover its proper charges for services performed." *Southern Pacific Transportation Co.* v. *Commercial Metals Co.*, *supra*, slip op. 7. See *Louisville & Nashville R.R.* v. *Central Iron Co.*, 265 U.S. 59, 65-66 & n.3 (1924); *Pittsburgh, C., C. & St. L. Ry.* v. *Fink*, 250 U.S. 577, 581 (1919). As the Court explained in *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, *supra*, 306 U.S. at 520-521 (footnote omitted), the Act

> forbids the carrier from giving a voluntary rebate in any shape or form. * * * It is equally important to aid the efforts of a carrier in collecting published charges in full. Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates.

Of course, this does not mean that a shipper is without recourse in the event the carrier's rates are unlawful. "If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation." *Pennsylvania R.R* v. *International Coal Co.*, *supra*, 230 U.S. at 197. As noted above, the Act provides that new or preexisting tariff rates may be challenged as unreasonable or unlawful by the filing of a complaint with the Commission, which is empowered to order appropriate relief. 49 U.S.C. (Supp. III) 10707, 11701(b).

" 'The considerations underlying the [filed rate] doctrine * * * are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant.' " *Arkansas Louisiana Gas Co.* v. *Hall*, *supra*, slip op. 6, quoting *City of Cleveland* v. *FPC*, 525 F.2d 845, 854 (D.C. Cir. 1976). See *City of Piqua* v. *FERC*, 610 F.2d 950, 955 (D.C. Cir. 1979); *Maine Public Service Co.* v. *FPC*, 579 F.2d 659, 667 (1st Cir. 1978). It is clear that the statutory goals of equality and certainty of published rates would be frustrated by recognizing an authority in the courts, independent of that of the regulatory agency, to pass upon the validity of rates. As this Court stated in the landmark case of *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 441 (1907), "the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted." By in effect sanctioning San Antonio's violation of the filed rate doctrine in this case, the court of appeals thus has undermined one of the basic goals of the Interstate Commerce Act.

San Antonio argues (Br. in Opp. 15), however, that the filed rate doctrine has no application when "carrier tariffs * * * contravene ICC rate orders." In other words, San Antonio's position is that when

a tariff rate on file with the Commission differs from the prescribed rate, the shipper is obligated to pay the prescribed rather than the filed rate. But the Commission consistently has held that the shipper in such a situation is obligated to pay the tariff rate, even if that rate violates an outstanding rate prescription order. See *Acme Peat Products, Ltd.* v. *Akron, C. & Y. R.R.*, 293 I.C.C. 510, 510-511 (1954) ("a rate published in a tariff on file with the Commission does not become inapplicable by reason of the fact that it contravenes an order of the Commission * * *"); *Kansas City Fuel Oil Co.* v. *Atchison, T. & S.F. Ry.*, 210 I.C.C. 134, 136 (1935) ("[a] rate published in a tariff on file with the Commission even though in contravention of its order would still be the legal rate"); *Dewey Portland Cement Co.* v. *Atchison, T. & S.F. Ry.*, 188 I.C.C. 97, 98 (1932) (same).[15]

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[15] San Antonio relies (Br. in Opp. 15) on several cases holding that Commission-prescribed demurrage rates prevail over railroad demurrage tariffs stating a different rate. *Armour & Co.* v. *Louisiana Southern Ry.*, 190 F.2d 925 (5th Cir. 1951), cert. denied, 342 U.S. 913 (1952); *Foreston Coal International* v. *Baltimore & Ohio R.R.*, 349 I.C.C. 495 (1975), aff'd *sub nom. Island Creek Coal Sales Co.* v. *ICC*, 561 F.2d 1219 (6th Cir. 1977). In *Armour*, the court held that a valid Commission order prescribing demurrage schedules superseded and effectively suspended specific inconsistent demurrage tariffs. 190 F.2d at 928. In *Foreston*, a case also involving demurrage charges, the Commission relied on the *Armour* holding and declared that demurrage rates prescribed in a general car service order were "self-executing" (349 I.C.C. at 499), in effect sanctioning payment of the prescribed rather than the tariff rate.

Both *Armour* and *Foreston* are distinguishable because they involved the Commission's exercise of its power under

The appropriate remedy for a shipper in these circumstances is to file a complaint with the Commission under 49 U.S.C. (Supp. III) 11701(b), or otherwise petition the Commission for relief. Here, San Antonio did not comply with the statutory procedures but resorted to self-help instead. By upholding San Antonio's unilateral and unauthorized action, the court below has created a serious inequity. As the Commission explained (Pet. App. F-8), it is not empowered to award reparations to the railroads should it ultimately determine that they were entitled to charge the higher rate set forth in their tariff. Had San Antonio paid the tariff rate, as required by law, this breakdown in statutory protection never would have occurred. The court of appeals' decision should be reversed to prevent similar resorts to self-help in disregard of the regulatory scheme established by Congress in the Act.

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former Section 1(15) of the Act to issue emergency orders, on its own initiative and without notice or hearing, to relieve railroad car or equipment shortages by suspending the operation of established rules and regulations, including railroad demurrage tariffs. See *Armour, supra*, 190 F.2d at 926 n.1. The court in *Armour* explicitly relied on the exercise of the Commission's emergency powers (*id.* at 928), as did the Commission in *Foreston*. Unlike those cases, the prescription in this case does not involve use of the Commission's emergency powers to relieve freight car shortages.

San Antonio also relies (Br. in Opp. 15) on *Nashville Traffic Bureau* v. *Louisville & Nashville R.R.*, 53 I.C.C. 37 (1919). That case did not directly address the question of which rate the shipper must pay, but simply held that where the carrier exacts tariff rates in excess of a valid Commission prescription the shipper is entitled to reparations. *Id.* at 38.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 379931 695

Respondent's Brief

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Office - Supreme Court, U.S.
FILED
JUL 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1008

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BURLINGTON NORTHERN INC. AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENT SAN ANTONIO, TEXAS

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July 17, 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

In 1976, the Interstate Commerce Commission found that the Petitioners' freight rate on coal moving from Wyoming to San Antonio, Texas was unlawfully high. At the City of San Antonio's request, the Commission issued an order prescribing the maximum lawful rate Petitioners could charge the City for the coal transportation service. The Commission's prescription order was reviewed and affirmed by the United States Court of Appeals for the Eighth Circuit in 1977. Subsequently, at the request of the Petitioners, and over the strenuous opposition of San Antonio, the Commission issued two (2) more rate orders (one in 1978 and the second in 1979) that modified the 1976 order by prescribing successively higher maximum rates. Each of the three (3) prescriptive orders entered by the Commission was subject to periodic, Commission-approved escalation to permit the prescribed rates to keep pace with inflation.

On June 9, 1980, the court below, following judicial review of the modification orders, entered a decision vacating the Commission's 1978 and 1979 orders. A dispute then arose between San Antonio and the Petitioners as to whether the effect of the court's decision was to reinstate the lower rate ceiling established through the original 1976 prescription order (the 1976 prescribed rate, as escalated to June 1980 inflation levels) or whether the carriers could continue to charge the higher rate prescribed by the Commission in the vacated modification orders.

On November 24, 1980, Petitioners asked the court below to resolve the dispute by issuing a decision "clarifying" the meaning of its June 9 opinion. Thereafter, the Commission entered an order on April 7, 1981 vacating its 1976 prescription order.

On June 30, 1981, the Court of Appeals answered the question posed by the Petitioners in a decision confirming that its vacation of the 1978 and 1979 modifying orders left the 1976 ICC order in effect until that order was set aside by operation of the Commission's April, 1981 order. The court also ruled that tariffs filed by Petitioners containing rates in excess of the maximum level prescribed in the original order were unlawful

during the time the ICC's first order remained in force (July, 1980 to May, 1981).

The questions presented are whether the court below correctly ruled (1) that the effect of its June, 1980 decision was to reinstate the Commission's initial rate prescription until that prescription was set aside by the Commission on remand and (2) that rates sought by Petitioners which failed to conform to the reinstated Commission prescriptive order were unlawful. In addition, San Antonio challenges Petitioners' assertion that this Court has jurisdiction to respond to these questions on grounds that their petition for a writ of certiorari was not timely filed.

PARTIES TO THE REVIEW PROCEEDING IN THE COURT OF APPEALS

The proceeding below involved three consolidated petitions for review: No. 78-2051, *San Antonio, Texas* v. *United States*, No. 78-2216, *State of Texas* v. *United States*, and No. 78-2307, *Burlington Northern, Inc.* v. *United States*.* The parties to this review proceeding were:

San Antonio, Texas Acting By and Through Its City Public Service Board

The State of Texas

The United States of America

The Interstate Commerce Commission

Burlington Northern Inc.

Colorado & Southern Railway Company

Fort Worth & Denver Railway Company

Southern Pacific Transportation Company

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* The Department of Energy also filed, and subsequently withdrew voluntarily, a related petition for review.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE REVIEW PROCEEDING IN THE COURT OF APPEALS	iii
TABLE OF AUTHORITIES	vi
JURISDICTION	1
STATEMENT OF THE CASE	3
A. The Genesis of San Antonio's Rate Dispute With Petitioners, Circa 1972-1975	3
B. The Commission's 1976 *San Antonio I* Prescriptive Order	5
C. The 1978 and 1979 Orders Modifying the *San Antonio I* Order	7
D. The Court of Appeals' 1980 Vacation Of The 1978 and 1979 Modifying Orders	10
E. The Ensuing Dispute Over The San Antonio Rate Level	12
1. The Carriers' first unsuccessful attempt to shut down San Antonio's coal trains	13
2. The Carriers' return to the Court of Appeals for "clarification" of the Court of Appeals' June, 1980 decision	15
3. Renewed litigation and the Carriers' second attempted train shutdown	17
4. The Commission's April, 1981 vacation of the *San Antonio I* order and accompanying review proceedings	18
F. The Court of Appeals' June, 1981 Decision Responding To The Carriers' Clarification Petition	20
SUMMARY OF THE ARGUMENT	21
ARGUMENT	23
I THE COURT OF APPEALS CORRECTLY DETERMINED THAT ITS VACATION OF THE *SAN ANTONIO II* AND *III* ORDERS LEFT *SAN ANTONIO I* AS THE GOVERNING ICC PRESCRIPTION ORDER	23
A. The Court Of Appeals Did Not Engage In Prohibited Judicial Ratemaking	24

Table of Contents Continued

Page

B. Petitioners' And Federal Respondents' Attempt To Construe Away *San Antonio I* Ignores Reality 29

C. The Court Of Appeals' Decision Is Consistent With The Principles Of Primary Jurisdiction . 34

D. The Interstate Commerce Act Directs The Conclusions Reached By The Court of Appeals 38

1. The Court of Appeals correctly ruled that the Act requires the Commission, not the court, to set aside *San Antonio I* 38

2. The decision below does not promote regulatory lag or impede carriers' rights to seek review of ICC rate orders 41

II THE COURT OF APPEALS CORRECTLY RULED THAT RATES CHARGED IN VIOLATION OF THE *SAN ANTONIO I* PRESCRIPTIVE ORDER WERE UNLAWFUL 42

A. The Act Expressly Forbids Railroads From Publishing Or Collecting Rates In Excess Of Those Prescribed By The Commission 43

B. The Filed Rate Doctrine Does Not Sanction Unlawful Carrier Pricing Activities 44

CONCLUSION 49

ADDENDUM 1a

TABLE OF AUTHORITIES

CASES: Page

Akron, C. & Y. Ry. v. *United States*, 261 U.S. 184 (1923) 40

Arizona Grocery Co. v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932) ..... *passim*

Arkansas-Louisiana Gas Co. v. *Hall*, 453 U.S. 571 (1981) 43, 47

Armour & Co. v. *Louisiana Southern Ry.*, 190 F.2d 925 (5th Cir. 1951) 46

Arrow Transp. Co. v. *Southern Ry.*, 372 U.S. 658 (1963) 21, 25, 26, 37

Atchison, T. & S.F. Ry. v. *Wichita Board of Trade*, 412 U.S. 800 (1973) ..... *passim*

Atlantic Coast Line R.R. v. *State of Florida*, 295 U.S. 301 (1935) 22, 28

Boston & M. R.R. v. *Piper*, 246 U.S. 439 (1918) 46

Burlington Northern, Inc. v. *United States*, 555 F.2d 637 (8th Cir. 1977) 6

Butler v. *Eaton*, 141 U.S. 240 (1891) 27

Carolina, C. & O. Ry. v. *ICC*, 593 F.2d 1305 (D.C. Cir. 1979) 46

Celanese Chemical Co., Inc. v. *United States*, 632 F.2d 568 (5th Cir. 1980), *cert. denied*, 453 U.S. 950 (1981) 42

Chicago, Burlington & Quincy R.R. v. *United States*, 242 F. Supp. 414 (N.D. Ill. 1965) *aff'd per curiam*, 382 U.S. 422 (1966) 22, 29

Chicago, M. & St. P. Ry. v. *Hormel Co.*, 240 Fed. 381 (8th Cir. 1917) 31

Chicago and North Western Ry. v. *Atchison, T. & S.F. Ry.*, 387 U.S. 326 (1967) 40

City of Cleveland v. *FPC*, 525 F.2d 845 (D.C. Cir. 1976) 47

Consolidated Rail Corp. v. *Nat'l Association of Recycling Industries, Inc.*, 449 U.S. 609 (1981) ..... *passim*

Davis v. *Portland Seed Co.*, 264 U.S. 403 (1924) 48

FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) 26

Federal Election Comm'n v. *Democratic Senatorial Campaign Committee*, ___ U.S. ___, 102 S. Ct. 38 (1981) 49

Table of Authorities Continued

Page

FPC v. *Idaho Power Co.*, 344 U.S. 17 (1952) 1
FTC v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965) .. 1
FTC v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952) 1, 2
Ford Motor Co. v. *NLRB*, 305 U.S. 364 (1939) 27
Greene v. *United States*, 376 U.S. 149 (1964) 22, 27
Indiana Harbor Belt R.R. v. *Jacob Stern & Sons*, 37 F. Supp. 690 (N.D. Ill. 1941) 46
In Re Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978) 25
Interstate Commerce Commission v. *Jersey City*, 322 U.S. 503 (1944) 22, 28
Iowa Public Service Co. v. *ICC*, 643 F.2d 542 (8th Cir. 1981) 41
Louisville & Nashville R.R. v. *Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925) 22, 27, 31
Lowden v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939) 48
Mars Express, Inc. v. *Masnik*, 401 F.2d 891 (2d Cir. 1968) 46
Nader v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976) 35
Pennsylvania R.R. v. *International Coal Mining Co.*, 230 U.S. 184 (1913) 48
Pittsburgh, C.C. & St. C. Ry. v. *Fink*, 250 U.S. 577 (1919) 48
Porter v. *Commissioner of Internal Revenue*, 288 U.S. 436 (1933) 31
San Antonio, Texas v. *Burlington Northern, Inc.*, 650 F.2d 49, *clarified*, 652 F.2d 422 (5th Cir. 1981) . 20, 37
San Antonio, Texas v. *United States*, 631 F.2d 831 (D.C. Cir. 1980) 1
Seaboard Airline R.R. v. *Daniel*, 333 U.S. 118 (1944) . 44
SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) 26
Southern Motor Carriers Rate Conference v. *United States*, 667 F.2d 971 (11th Cir. 1982) 47

Table of Authorities Continued

Page

Southern Pacific Transp. Co. v. *Commercial Metals Co.*, ___ U.S. ___, 102 S. Ct. 1815 (1982) 48

State of Florida v. *United States*, 282 U.S. 194 (1931) . 28

State of Florida v. *United States*, 292 U.S. 1 (1934) .. 28

System Fuels, Inc. v. *United States*, 642 F.2d 112 (5th Cir. 1981) 41

Union Pacific R.R. v. *United States*, 637 F.2d 764 (10th Cir. 1981) 41

United Airlines, Inc. v. *CAB*, 518 F.2d 256 (7th Cir. 1975) 46

United States v. *SCRAP*, 412 U.S. 669 (1973) 21, 25

United States v. *U.S. Smelting*, 339 U.S. 186 (1950) .. 26

United States v. *Western Pacific R.R.*, 352 U.S. 59 (1956) 35

ICC PROCEEDINGS:

Acme Peat Products Ltd. v. *Akron, C. & Y. R.R.*, 293 I.C.C. 510 (1954) 48

Consolidated Rail Corporation—Petition to Eliminate Docket No. 28300 Class Rate Prescription, 364 I.C.C. 615 (1981) 32, 39

Dewey Portland Cement Co. v. *Atchison T. & S.F. Ry.*, 188 I.C.C. 97 (1932) 48

The Fifteen Percent Case, 45 I.C.C. 303 (1917) 39

Foreston Coal International v. *Baltimore & Ohio R.R.*, 349 I.C.C. 495 (1979), *aff'd sub nom. Island Creek Coal Sales Co.* v. *I.C.C.*, 561 F.2d 1219 (6th Cir. 1977) 46, 49

Free Time on Export Traffic U.S. Ports, 346 I.C.C. 379 (1974) 39

Georgia Pub. Serv. Comm'n v. *Atlantic Coast Line R.R.*, 186 I.C.C. 157 (1932) 28

Kansas City Fuel Oil Co. v. *Atchison, T. and S.F. Ry.*, 210 I.C.C. 134 (1935) 48

Nashville Traffic Bureau v. *Louisville & Nashville R.R.*, 53 I.C.C. 37 (1919) 46

Table of Authorities Continued

Page

Potomac Electric Power Co. v. *Consolidated Rail Corp.*, 362 I.C.C. 169 (1980) 11

Prepayment of Rates—San Antonio Coal Movements, I&S Docket No. 9253 (Decision served Nov. 14, 1980) 2, 14, 15, 16, 37

Rate Structure Investigation, Part 7, Grain and Grain Products Within the Western District and For Export, 329 I.C.C. 824 (1967) 29, 32

San Antonio, Texas v. *Burlington Northern, Inc.*, No. 36180 (Decision served September 30, 1976) (unprinted) 6

San Antonio, Texas v. *Burlington Northern, Inc.*, 355 I.C.C. 405 (1976) *(San Antonio I)* ..... *passim*

San Antonio, Texas v. *Burlington Northern, Inc.*, No. 36180 (Decision served Jan. 3, 1978) 8

San Antonio, Texas v. *Burlington Northern, Inc.*, 359 I.C.C. 1 (1978) *(San Antonio II)* ..... *passim*

San Antonio, Texas v. *Burlington Northern, Inc.*, 361 I.C.C. 482 (1979) *(San Antonio III)* ..... *passim*

San Antonio, Texas v. *Burlington Northern, Inc.*, 362 I.C.C. 161 (Decided Dec. 3, 1979) *(San Antonio IV)* 10

San Antonio, Texas v. *Burlington Northern, Inc.*, 364 I.C.C. 887 (1981) *(San Antonio V)* 18, 22, 23, 32, 36

Southwestern Millers' League v. *Atchison, T. & S.F. Ry.*, 364 I.C.C. 724 (1981) 32, 39

STATUTES:

Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1976) 10

Hepburn Act, Pub. No. 337, 34 Stat. 584 (1906)

§ 2. 45

§ 4. 45

Table of Authorities Continued

Page

Interstate Commerce Act,
49 U.S.C. § 1(15) 46
49 U.S.C. § 10101 *et seq.* 3
49 U.S.C. § 10327(h) 20
49 U.S.C. § 10704a 45, 46
49 U.S.C. § 10704(a)(1) 5, 23, 45
49 U.S.C. § 10707 ..... 14, 32
49 U.S.C. § 10761(a) 44, 45
49 U.S.C. § 11123 46
49 U.S.C. § 11705a 38

Judicial Code:
28 U.S.C. § 2349 42
28 U.S.C. § 2350 2
28 U.S.C. § 2350(a) 1, 2

Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976) .. 7, 9, 12

Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980):
§ 203(c) 14, 17
§ 203(c)(1) 15

LEGISLATIVE MATERIALS:

Staggers Rail Act of 1980, Report of the Committee on Conference, H.R. Rep. No. 96-1430, 96th Cong. 2d Sess. 95 (1980) 14

S. Rep. No. 96-266, 59th Cong. 2d Sess. (1907) 45

COURT RULES:
Sup. Ct. R. 20.2 1
Sup. Ct. R. 34.2 3
Fed. R. App. P. 28(a)5 11

Table of Authorities Continued

Page

MISCELLANEOUS:

American Jurisprudence 2d, Vol. 2, *Administrative Law* § 762 (1962) 27

Black's Law Dictionary (Rev. 5th Ed. 1979) 31

Brief of Petitioner, *Burlington Northern, Inc.* v. *United States*, No. 81-755, *cert. denied*, ___ U.S. ___, 102 S.Ct. 1253 (1982) 44

Corpus Juris Secundum, Vol. 58, *Modify* p. 840 (1948) 31

Corpus Juris Secundum, Vol. 73, *Public Administrative Bodies and Procedure*, § 242 (1951) 27

Joint Brief of the Interstate Commerce Commission and the United States, *Burlington Northern, Inc.* v. *United States*, 555 F.2d 637 (8th Cir. 1977) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1008

BURLINGTON NORTHERN INC. AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR RESPONDENT SAN ANTONIO, TEXAS

JURISDICTION

Petitioners *cannot* invoke the jurisdiction of this Court because their petition for a writ of certiorari was not filed "within the time prescribed by law." Sup. Ct. R. 20.2. In the June, 1981 decision Petitioners bring before the Court (*San Antonio, Texas* v. *United States*, 655 F.2d 1341 (D.C. Cir. 1981) (App. to Cert. Petn. A)), the Court of Appeals expressly held that its decision simply explained "what we said" (*id.* at A-3) in its earlier judgment entered in June of 1980 (*San Antonio, Texas* v. *United States*, 631 F.2d 831 (D.C. Cir. 1980) (App. to Cert. Petn. B)). "Nothing more was intended, expressly indicated, or implicitly suggested." (App. to Cert. Petn. A-3) Thus, the decision challenged before this Court merely restated, without changing in any way, the judgment entered one year earlier. Under the express holdings of this Court, the statutory time periods for seeking certiorari run from the entry of the first judgment "[i]f the court did no more by the second judgment than to restate what it had decided by the first one. . . ." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). *Accord FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 379 (1965); *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952).

The time for filing a petition for a writ of certiorari seeking the Court's review of the operative June, 1980 decision expired on October 14, 1980. *See* 28 U.S.C. § 2350(a) (application for a writ of certiorari shall be made within 90 days of the entry of final judgment). Consequently, Petitioners' November 24, 1981 petition is over one (1) year late.

Petitioners had the opportunity to seek timely review by this Court of the June 1980 judgment but they chose not to do so. Instead they waited until the time for seeking review in this Court had expired before filing, on November 24, 1980, a "petition for clarification" (J. App. 16) asking the lower court to construe its judgment "to avoid further disputes" between the parties as to its intended effect.[1] Petitioners did not ask the

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[1] *Petition for Clarification of Mandate* at 10 (filed Nov. 24, 1980). Petitioners could have, but did not, include in their timely *Petition*

Court of Appeals to modify, supplement or amend its previous decision and the lower court did not make any changes in its earlier action in responding to the Petitioners' request. Nevertheless, Petitioners now seek to welch on their representation to the lower court that its decision was needed for purposes of ending a dispute by using its decision as a basis for continuing the dispute.

"[L]itigation must at some definite point be brought to an end." *FTC* v. *Minneapolis-Honeywell Regulator Co.*, *supra*, 344 U.S. at 213. A case will never "be brought to an end" if dissatisfied litigants can at any time ask a court to "clarify" its decision in a particular case and then turn around and further challenge the explanatory decision, even when, as here, the court carefully avoids making any changes in the original decision.[2] Petitioners failed to seek review of the Court of Appeals' June, 1980 decision in timely fashion as required by 28 U.S.C. § 2350 and the decisions of this Court. They cannot be heard now to complain about the consequences of their own

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for Rehearing and Clarification and Suggestion for Rehearing En Banc (Dated June 23, 1980) the same request that they subsequently incorporated into their November clarification petition.

[2] Petitioners argue that the Court of Appeals' second decision resolved a "genuine ambiguity" concerning the effect of the court's first decision on the rates Petitioners could charge and, therefore, San Antonio's jurisdictional challenge is "frivolous." *Railroads' Reply to Brief of Respondent San Antonio, Texas in Opposition to the Petition for Writ of Certiorari* at 12 fn. 18 (Dated February 11, 1982). The effect of the court's decision was never "ambiguous" to San Antonio, who informed the Petitioners through its briefs filed prior to the issuance of the Court of Appeals' first decision that the legal effect of the court's vacation of the two orders before it would be "to reinstate the rate level prescribed by the Commission in *San Antonio I [San Antonio, Texas* v. *Burlington Northern, Inc.*, 355 I.C.C. 405]" (J. App. 10). Nor was it ambiguous to the ICC, who, when asked, unhesitatingly ruled that the effect of the Court of Appeals' vacation order was the restoration of its 1976 order. *Prepayment of Rates—San Antonio Coal Movements*, I&S Docket No. 9253 (Decision served Nov. 14, 1980) (J. App. 13-15).

inaction, and the Court should summarily dismiss the writ of certiorari.

STATEMENT OF THE CASE

This case involves but one complicated episode in what may turn out to be the longest running effort by a municipally owned utility to obtain relief from the monopoly-pricing tactics of railroads subject to rate regulation by the Interstate Commerce Commission ("Commission" or "ICC") under the Interstate Commerce Act ("Act") now codified at 49 U.S.C. § 10101a *et seq*. In their recitation of the events giving rise to the questions now before the Court, Petitioners and Federal Respondents have omitted certain important facts and inaccurately represented others. Therefore, San Antonio presents its reply statement of the case. Sup. Ct. R. 34.2.

A. The Genesis Of San Antonio's Rate Dispute With Petitioners, Circa 1972-1975

The City of San Antonio, Texas ("San Antonio") was among the very first large consumers of energy in the United States to encounter our nation's then emerging energy crisis. In 1972, the price San Antonio paid for natural gas to fuel its municipally-owned electric generating system abruptly quadrupled and home electric bills doubled. An unprecedented demonstration of public concern over escalating electric bills followed in the form of protest rallies, ratepayer revolts, and citizen lawsuits. (App. to Cert. Petn. E-2).

In order to reduce its consumers' electric charges or, at least, prevent them from increasing as fast, San Antonio embarked upon a very costly capital program to construct new power plants which could utilize abundant western coals as their fuel instead of natural gas. (*Id*. at E-2). A critical component of the economic success of the conversion program was the price for the rail transportation of the three million (3,000,000) tons of coal which San Antonio estimated it would need annually. (*Id*. at E-3)

Petitioners,[3] whose lines link together to provide the only rail transportation of low-sulfur coal mined in Wyoming's Powder River Basin (*id.* at B-41), were most interested in San Antonio's need for coal transportation. In July, 1973, San Antonio was furnished with a proposed tariff schedule rate of $7.90 per ton which was both satisfactory to San Antonio and commensurate with the then-going price of comparable coal transportation. Thereafter, in May 1974, following the OPEC Oil Embargo, Petitioners abruptly raised their proposed coal rate from $7.90 to $11.09 per net ton. (*Id.* at E-3). Petitioners cited "unprecedented cost increases" as the reason for the 30% hike in their quote, but refused to explain or identify the nature of the "cost increases." (*Id.* at B-5).[4] In fact, as later recognized by the Commission, the increase was attributable not to any cost increases, but to a classic "bait and switch" tactic, where the Railroads "engaged in various pricing maneuvers in an attempt to use their newly monopolistic position to enhance their revenues." (*Id.* at D-8).

San Antonio was unwilling to pass on what amounted to a $287 million increase in coal freight rates to its citizens without some substantiation from the Petitioners.[5] Left without alternatives, San Antonio, in May of 1975, a year and one-half

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[3] Petitioners, who are the Burlington Northern Inc. and the Southern Pacific Transportation Company, will hereinafter sometimes be referred to as the "Railroads" or the "Carriers."

[4] *See also* Volume II of the Joint Appendix filed in the United States Court of Appeals for the District of Columbia Circuit in the proceedings below at 435. Hereinafter this Joint Appendix will be cited as "D.C. Cir. J. App." The appendix is included in the record certified and transmitted by the lower court to this Court.

[5] The new rate of $11.09 was higher than the rate initially proposed by $3.19 per ton. Multiplying this differential by San Antonio's 3 million ton annual coal requirement and using a thirty-year useful life of the coal plant, results in the $287 million figure, i.e. $3.19 per ton x 3 million tons x 30 years. Transportation charges are included in the fuel surcharges that San Antonio incorporates in its monthly billings to its utility customers.

before the scheduled start-up of its coal trains, filed a complaint requesting the Commission to establish a rate for its traffic pursuant to its powers under Section 10704 of the Act.

B. The Commission's 1976 *San Antonio I* Prescriptive Order

In the proceeding instituted in response to San Antonio's complaint, the Railroads asked the Commission to set a rate of $12.70 per ton (as of July 1975) while San Antonio urged the establishment of a rate no higher than $9.00. (App. to Cert. Petn. at E-5, E-6). Following extensive evidentiary hearings, the Commission reached a decision in October, 1976. Relying upon evidence as to rates on comparable movements, service costs and the economic needs of both Petitioners and the citizens of San Antonio, the Commission exercised its power under § 10704(a)(1) of the Act and prescribed a maximum rate of $10.16 per net ton. *San Antonio, Texas* v. *Burlington Northern, Inc.*, 355 I.C.C. 405 (1976) ("*San Antonio I*") (App. to Cert. Petn. E). Under the Act, carriers are forbidden to "publish, charge or collect" a rate higher than a maximum rate prescribed by the Commission (49 U.S.C. § 10704(a)(1)).

Based on its decisional cost findings, the Commission estimated that the *San Antonio I* rate would contribute more than $6 million per year in profits to the Railroads (over their variable costs). (*Id.* at E-13). The ICC also ruled that the rate would be subject to Commission-approved general rate increases to permit the prescribed rate to keep pace with inflation,[6] and, after noting that its prescription was made on the basis of projected train operations, the Commission stated that the prescription could be modified if warranted by evidence obtained from the "actual experience" of operating the trains.

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[6] At all times since the *San Antonio I* rate was first placed into effect in 1976, San Antonio's rates have been increased by Commission-authorized general rate increases. The Addendum attached to this Brief records these increases.

Id. Train operations began in November, 1976 and continue to this day.

After the ICC issued *San Antonio I*, the Railroads filed a petition to review the order in the United States Court of Appeals for the Eighth Circuit. The Commission responded to support the *San Antonio I* order, and continually stressed to the Eighth Circuit the "handsome contribution" made by the San Antonio coal traffic to Petitioners, and the fact that the rate Petitioners wanted to voluntarily file with the agency would make San Antonio "the victim of a monopoly situation." Joint Brief of the Interstate Commerce Commission and the United States at 33, 37, *Burlington Northern, Inc.* v. *United States*, 555 F.2d 637 (8th Cir. 1977). With great reluctance, San Antonio joined the ICC in supporting the Commission's prescription order even though that order set a rate substantially higher than the one it had sought before the Commission.[7] San Antonio supported the ICC's order because it knew that if the Eighth Circuit vacated the *San Antonio I* order, there would be no order limiting the Carriers' pricing freedom and they would then dramatically raise their rate. Indeed, before the Eighth Circuit, the Railroads said that they intended to file a rate substantially higher than the prescribed *San Antonio I* rate if the order below was vacated. (Brief of Petitioners at 46, *Burlington Northern, Inc.* v. *United States*, *supra*).[8] On March 29, 1977, the Eighth Circuit issued a decision upholding the Commission's rate prescription order. *Id.*

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[7] San Antonio was particularly concerned with some of the Commission's costing methodologies which, in San Antonio's estimation, resulted in substantial overstatements of the Railroads' actual service costs, and by the Carriers' refusal to turn over to San Antonio actual data that was needed to compute their costs accurately.

[8] During the ICC hearings, the Railroads had unsuccessfully tried to file a $16.67 charge. *San Antonio, Texas* v. *Burlington Northern, Inc.*, No. 36180 (Decision served Sept. 30, 1976) (unprinted).

C. The 1978 And 1979 Orders Modifying The *San Antonio I* Order

A mere two and one-half (2½) months after the entry of the decision of the Eighth Circuit upholding the *San Antonio I* order, the Railroads filed a petition with the ICC on June 14, 1977 to reopen the rate proceeding "for the receipt of additional evidence" (J. App. 7) and "to consider modification of the [*San Antonio I*] order . . . ." *Id.* The Commission granted the Railroads' request to reopen on October 27, 1977. Soon thereafter, however, it became apparent that the real goal of the Railroads was not to obtain an order modifying the *San Antonio I* order based upon additional evidence of "actual experience" in running the San Antonio trains but it was instead to have the ICC vacate the *San Antonio I* prescription altogether and thereby rid themselves of price control over this captive traffic. In filings following the Commission's October 27, 1977 order, the Railroads repeatedly asked the Commission immediately to vacate the *San Antonio I* rate order so that they could voluntarily file a rate of $18.23, a rate some $6.29 per ton higher than the prescribed *San Antonio I* rate.[9]

San Antonio vigorously opposed the Railroads' efforts to strip it of the protective umbrella of the *San Antonio I* prescription and introduced a comprehensive presentation rebutting the Railroads' case that the material evidence together with the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), Pub L. No. 94-210, 90 Stat. 31, mandated increases in San Antonio's rates. It was San Antonio's unequivocal position throughout the reopened proceedings that no increase in the *San Antonio I* prescription should be permitted

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[9] At this time, the *San Antonio I* rate stood at $11.94. *See* Addendum. The filings setting forth the Carriers' new objective included *Defendants' Statement of Fact and Argument* at 58 (Dated Dec. 12, 1977) (D.C. J. App. at 158) and the Railroads' *Petition For An Order Permitting BN and SP to File An Amended Tariff Applicable To Unit Train Coal Movements To San Antonio For Immediate Application, Subject to Possible Refund* at 9 (Dated December 16, 1977) (D.C. Cir. J. App. at 605).

because the *San Antonio I* rate, if anything, was itself too high. (D.C. Cir. J. App. II, 836; IV, 1977).

In early January, 1978, the Commission acted upon the Carriers' petitions for immediate vacation of the *San Antonio I* rate order. On January 3, the ICC issued an order denying the Carriers' vacation requests and deferred further action on these requests until "the Commission has ruled upon the merits of the reopening." *San Antonio, Texas* v. *Burlington Northern, Inc.*, No. 36180 (Decision served Jan. 3, 1978) (D.C. Cir. J. App. II, 642). Thereafter, upon completion of the reopened proceedings, the Commission issued its *San Antonio II* decision and order.[10]

In *San Antonio II*, the Commission again rejected the Railroads' request to vacate the *San Antonio I* prescription so as to restore to them their pricing initiative on this traffic. Only one Commissioner of the six that decided *San Antonio II* voiced any sentiments favoring vacation of *San Antonio I*, but even this Commissioner did not ultimately recommend that action. (App. to Cert. Petn. D-19). While rejecting the vacation of the *San Antonio I* order as sought by the Railroads, the Commission's *San Antonio II* order did expressly modify the *San Antonio I* order by permitting the Railroads a 30% increase over the then-current *San Antonio I* rate of $12.42, making the effective rate $16.12 per ton. The Commission's two paragraph order reads in pertinent part:

> *It is ordered:*
>
> 1) That defendants are permitted to establish a rate not exceeding $16.12 per net ton, and our prior order is modified accordingly.
>
> 2) This proceeding is dismissed . . . .

(*Id.* at 20).

In the decision accompanying the Commission's order, the Commission chastised the Railroads for failing to divulge evidence of their actual operations and found that using the best

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[10] *San Antonio, Texas* v. *Burlington Northern, Inc.*, 359 I.C.C. 1 (Decided Oct. 19, 1978) (App. To Cert. Petn. D-1).

cost evidence of record, the *San Antonio I* rate was, in fact, producing more profits for the Carriers than it was initially designed to provide.[11] Nonetheless, based solely upon its belief that the recently enacted 4-R Act mandated an increase in San Antonio's coal rate, the Commission proceeded to add an enormous "revenue need" return factor to the *San Antonio I* rate to produce the new $16.12 rate. (App. to Cert. Petn. D-20).

After the issuance of *San Antonio II*, San Antonio, the Railroads and the State of Texas[12] filed various petitions and appeals with the ICC directed at the *San Antonio II* decision. San Antonio, the Railroads and the State of Texas also filed petitions for review of the *San Antonio II* order in the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals"). In response, the Commission, *inter alia*, issued a decision served on November 29, 1978 wherein it affirmed that the *San Antonio II* order did not vacate the *San Antonio I* order, because that first order "was modified only to the extent that a different maximum level of rates was prescribed." (D.C. Cir. J. App. IV, 2117). Then, on June 1, 1979, the Commission issued its *San Antonio III* decision.[13] In *San Antonio III*, the Commission proceeded to tack on a seven (7) percent surcharge to its *San Antonio II* rate to further "assist" the Carriers in meeting their 4-R Act "revenue needs." (App. to Cert. Petn. C-16-17). The new rate became $17.23 per ton.

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[11] The Commission's *San Antonio I* rate was set at $2.13 per ton over variable cost. (App. to Cert. Petn. D-3.) In *San Antonio II*, the Commission found that the $12.42 *San Antonio I* rate was now contributing $2.34 per ton over variable costs of $10.08. *Id.* at D-36. The 21¢ differential times 3 million tons results in a $600,000 increase in revenue over cost.

[12] The State of Texas intervened in the *San Antonio II* proceedings, and was granted party status by the ICC.

[13] *San Antonio, Texas* v. *Burlington Northern, Inc.*, 361 I.C.C. 482 (Decided May 23, 1979) (App. to Cert. Petn. C-1).

Id. at C-17. Thus, in a few years, San Antonio had seen its lifetime coal transportation bill rise from the original quote of $23.7 million to $51.7 million a year, which translates into a simple increase of $28 million annually, or $840 million over the life of the plant.

San Antonio, the Railroads and the State of Texas thereafter amended their Petitions for review to include *San Antonio III*, and the Commission subsequently denied requests for modification of *San Antonio III*, by, *inter alia*, the newly established Office of Rail Public Counsel[14] in *San Antonio, Texas* v. *Burlington Northern, Inc.*, 362 I.C.C. 161 (Decided Dec. 3, 1979) (*San Antonio IV*).

D. The Court Of Appeals' 1980 Vacation Of The 1978 And 1979 Modifying Orders

Before the Court of Appeals, San Antonio argued that the Commission had violated the Act, its own regulations, and the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*) in adding a multi-million dollar increase to the highly profitable *San Antonio I* rate level. (J. App. 9-10) In contrast to the earlier situation before the Eighth Circuit when *San Antonio I* was appealed by the Railroads, San Antonio deliberately asked the Court of Appeals to vacate the *San Antonio II* and *III* rate orders because the legal effect of the vacation of these modifying orders would not restore the Carriers' pricing freedom, but instead would operate to leave the *San Antonio I* order in full force and effect. Thus, San Antonio specifically informed the Court of Appeals in the concluding section of its brief:

> For all of the above reasons, San Antonio requests that the Court vacate the Commission's Orders in *San Antonio II* and *San Antonio III* modifying its earlier rate prescription. Since there would then be no order of the Commission altering its original rate prescription, the carriers'

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[14] The Office of Rail Public Counsel, created by the 4-R Act to ensure that the public interest was represented in ICC proceedings, intervened in the *San Antonio II* and *III* cases. The Office is no longer in existence.

> tariffs would have to be amended to reinstate the rate level prescribed in *San Antonio I*.

(J. App. 10).[15]

The Railroads also challenged the Commission's *San Antonio II* and *III* decisions. In their Petition for Review, the Carriers urged the court to set aside the Commission's *San Antonio II* and *III* decisions "in part" by affirming the part which found *San Antonio I* too low, and vacating the part which prescribed the new rate. Thereafter, on brief the Carriers abandoned this request and instead argued that even if the *San Antonio II* and *III* orders were vacated *in toto*, the *San Antonio I* order would not be reinstated because the two (2) modification orders did not "prescribe rates." According to the Railroads, their prices were voluntary, not prescribed:

> The rate involved here is a carrier-made rate—not a Commission-prescribed rate, and the Supreme Court has expressly ruled that when Commission decisions in rate cases are set aside, the existing carrier-made rates continue in effect unless and until changed by the Commission upon remand. *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 819, 828-29 (1973).

(J. App. 12).[16]

In its June 9, 1980 decision, the Court of Appeals ignored the Carriers' request to set aside the *San Antonio II* and *III* orders only "in part." Instead, as requested by San Antonio, the court

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[15] This request presented by San Antonio was in specific compliance with Fed. R. App. P. 28(a)(5), which requires appellate briefs to contain "[a] short conclusion stating the precise relief sought." *Id.*

[16] The position is absurd because the Commission continually referred to the *San Antonio II* and *III* rates as prescribed, both in these decisions (*e.g.*, App. to Cert. Petn. C-2, C-17, D-4, D-8, D-14) and elsewhere. *See, e.g., Potomac Electric Power Company* v. *Consolidated Rail Corp.*, 362 I.C.C. 169, 182-83 (1980) ("In *San Antonio II* we prescribed a rate of $16.12 and in *San Antonio III* we prescribed a rate of $17.23 per net ton." *Id.* (footnote omitted)). Similarly, the Court of Appeals continually referred to the *San Antonio II*

vacated both orders and remanded the proceeding to the Commission. In support of its vacation order, the court rejected the Carriers' arguments that the Commission had understated their service costs (App. to Cert. Petn. B-12-17); agreed with many of San Antonio's arguments that the Commission had overstated the Carriers' service costs, including findings that investment returns had been "double counted" (*id.* at B-21) and that returns had been improperly allowed on deferred taxes (*id.* at B-31); and, most importantly, the court found, as requested by San Antonio, that the Commission's 4-R Act add-ons to the *San Antonio I* rate, primarily the "revenue need" return factor, were arbitrary and capricious. *Id.* at B-36, B-41. Finally, the court upheld the ICC's decision not to consider rate comparisons in prescribing the *San Antonio II* and *III* rates. *Id.* at B-11.

After issuance of the Court of Appeals' June 9, 1980 decision, the Railroads filed a timely petition seeking rehearing, rehearing en banc and clarification of the court's decision as it applied to its discussion of one cost issue. The petition for rehearing was denied, and clarification was granted in part. (Order filed July 16, 1980).

E. The Ensuing Dispute Over The San Antonio Rate Level

Immediately upon the issuance of the Court of Appeals' mandate on July 24, 1980, San Antonio notified the Railroads that it could not continue to pay the *San Antonio III* rate because the effect of the court's mandate was to reinstate the *San Antonio I* rate level. For transportation services received on and after July 24, 1980 San Antonio began to pay the charges based upon the *San Antonio I* rate order. The first such pay-

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and *III* rates as "prescribed" (*e.g.*, App. to Cert. Petn. B-3, B-5, B-9) which should have put the Carriers on notice that the court did not subscribe to their "carrier-made" rate theory. Even now, the Federal Respondents disavow the Railroads' initial position in this dispute by conceding that the *San Antonio I*, *II* and *III* rates were prescribed. *See, e.g., Brief For the Federal Respondents* at 3-5 (May, 1982).

ment was made on August 11, 1980.[17] At first, the Railroads took no action subsequent to July 24, 1980 other than to send San Antonio balance due invoices for the difference between the *San Antonio III* level rate they were billing and the *San Antonio I* level rate being paid by San Antonio. However, this proved to be only the calm before a storm of litigation.

1. The Carriers' first unsuccessful attempt to shut down San Antonio's coal trains

On September 9, 1980, the Railroads took their first post-mandate tariff action. Instead of conforming their tariff to the *San Antonio I* order, they retained the rate at the *San Antonio III* level. San Antonio petitioned the Commission's Tariff Integrity Board to reject the filing as not in compliance with the Commission's order. The ICC's Section of Tariffs Chief responded to San Antonio's complaint and stated in a two-page letter that the tariff was "susceptible neither to rejection nor to handling under the tariff integrity board procedures" and referred San Antonio's complaint to the ICC's Office of Proceedings. (Pet. App. Unpub. Filings No. 3). On November 7, San Antonio formally requested the Office of Proceedings to issue an order requiring the Railroads to bring their published tariff into conformity with the Commission's *San Antonio I* rate prescription order.[18] The Commission never ruled directly upon this request.

Next, San Antonio received a letter from the Burlington Northern on November 7, 1980 advising that effective November 16, 1980 in order for San Antonio to get transportation service it would have to prepay the *San Antonio III* rate of $21.95.[19] Shortly thereafter, a tariff setting forth the unique

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[17] *See Response In Opposition To Petition For Clarification of Mandate* at 2-3 (Filed Dec. 2, 1980), *San Antonio, Texas* v. *United States*, 655 F.2d 1341, *supra*.

[18] *See* Exhibit A to *Response In Opposition To Petition For Clarification of Mandate* (Filed December 2, 1980), *supra*.

[19] Rail service is customarily paid for after the movement is made.

prepayment requirement was filed with the Commission. San Antonio filed a formal protest under Act § 10707 seeking the suspension and investigation of the prepayment tariff. (Pet. App. Unpub. Filings No. 4). In addition, San Antonio collaterally sought emergency injunctive relief on November 13, 1980 in the United States District Court for the Western District of Texas, San Antonio Division, to prevent the Railroads from shutting down San Antonio's trains. Such a shutdown would have been disastrous as San Antonio depended on coal to meet its base-load service requirements.

On November 14, 1980, the Commission issued a decision in response to San Antonio's protest in I&S Docket No. 9253, *Prepayment of Rates—San Antonio Coal Movements*, and suspended the prepay tariff. This decision expressly affirmed San Antonio's position that the only lawful rate for the movement of its coal traffic was the rate prescribed in *San Antonio I*, as increased by general rate increases. Said the Commission:

> In that our order in *San Antonio III* has been vacated by the Court of Appeals for the District of Columbia, we believe, that the rate SP can lawfully charge for this service is the prescribed rate in *San Antonio I* as escalated by general increases.

(Pet. App. Unpub. Filings No. 5 at 1). Referring to the newly enacted rate "cap" on the San Antonio traffic set by Congress in Section 203(c) of Staggers Rail Act of 1980 ("Staggers Act"),[20] the Commission went on to hold:

> We note that under the Staggers Rail Act of 1980 . . . for this movement we may not allow rates to exceed 162 percent of the variable costs. The involved railroads are

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[20] Section 203(c) of the Staggers Rail Act of 1980, (Pub. L. No. 96-448 § 203(c), 94 Stat. 1904-05) was enacted by Congress as a direct and positive response to the years of litigation that characterized the "celebrated and extended dispute over the freight rate for rail transportation of coal to a municipally owned utility in San Antonio, Texas." *Staggers Rail Act of 1980, Report of the Committee on Conference*, H.R. Rep. No. 96-1430, 96th Cong. 2d Sess. 95 (1980). Section 203(c) is directed at the San Antonio coal rates and expressly

> free to file rates in conformance with these standards and to seek to have the *San Antonio I* prescription set aside.

(Pet. App. Unpub. Filings No. 5 at 1).

In light of the Commission's seemingly conclusive ruling in I&S No. 9253, San Antonio filed a motion for dismissal of its action for injunctive relief in the Texas district court. This motion was granted on November 26, 1980.

2. The Carriers' return to the Court of Appeals for "clarification" of the Court of Appeals' June, 1980 decision

Following their failure to convince the ICC that *San Antonio I* was not the lawful rate for San Antonio's coal traffic, the Railroads' next went to the Court of Appeals for relief. On November 24, 1980, they filed a petition with the court requesting it to "clarify" its decision vacating *San Antonio II* and *III* on grounds that the Commission's I&S No. 9253 decision was "based on a misconstruction of this Court's decision and mandate" (Nov. 22, 1980 letter from Carrier Counsel to the Court of Appeals) and that "clarification is necessary to avoid further disputes as to the rate which San Antonio must pay . . . ." (Nov. 24, 1980 *Petition For Clarification of Mandate* at 10). In their Petition, the Carriers contended that the Commission had misconstrued the court's mandate because under the Commission's construction the mandate operated to suspend carrier-filed rates, a result that the Railroads said violated this Court's decision in *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973) *("Atchison, Topeka")*.[21]

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provides that prior to "September 30, 1987, the Interstate Commerce Commission may permit increases in such rate which result in a revenue-variable cost percentage of not more than 162 percent." *Id.* § 203(c)(1). Thus, Section 203(c) requires the Commission to find that any increase in the San Antonio rate complies with the 162 percent cap.

[21] At this point in time, the Railroads' main theory to bring their high rate to San Antonio under the protection of *Atchison, Topeka*

The Commission responded to the Railroads' petition by arguing that the legal effect of the court's mandate was to reinstate *San Antonio I*, as was correctly decided in the Commission's decision in *I&S No. 9253:*

> The theory behind the Commission's decision is that when an order is vacated, it is voided and is as if it never existed. The applicable rate (until a petition to change it is granted) is necessarily the last valid prescribed rate that was not vacated by a court, *i.e.*, the *San Antonio I* rate.

(J. App. 20). The Commission also easily dispatched the Carriers' reliance on *Atchison, Topeka:*

> *[Atchison, Topeka]* . . . seems to stand for the principle that reviewing courts may not ordinarily enjoin or change a rate, but rather must remand the proceeding to the Commission for its determination. Contrary to the railroad's apparent belief (Petition 18), however, the Commission's determination that the *San Antonio I* rate now applies is not based on any notion that the Court suspended or enjoined the *San Antonio II* and *III* rates. On the contrary, it is the Commission's prior prescription of the *San Antonio I* rate that results in the Commission's conclusion that the *San Antonio I* rate is now applicable.

(J. App. 21).

While concluding that *San Antonio I* was reinstated as a matter of law upon the issuance of the Court of Appeals' mandate, the Commission believed that the reinstatement of the *San Antonio I* rate was "inequitable" and sought to invoke the equity powers of the court to enjoin the operation of the Commission's order. (J. App. at 23). San Antonio joined the ICC in arguing before the court that the legal effect of the court's mandate was to reinstate the *San Antonio I* prescription, but challenged the Commission's assertion that the *San Antonio I* rate was inequitable.

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held that its rate to San Antonio was carrier-made and not prescribed. It was not until much later that they concocted the theory here advanced that *San Antonio I* had been "lifted."

3. Renewed litigation and the Carriers' second attempted train shutdown

After the Railroads had filed their clarification petition with the Court of Appeals, they filed yet another tariff with the ICC setting forth a rate at the *San Antonio III* level (Pet. App. Unpub. Filings No. 7). Replying within the constricted time requirements applicable to the filing of challenges to carrier-initiated tariffs, San Antonio demonstrated that the Carriers' unilateral pricing action was null and void because the only way the *San Antonio I* prescriptive order could be set aside was after a hearing where the burden of proof was on the Railroads to show that the original order should be vacated or modified (Pet. App. Unpub. Filings No. 8). In the alternative, San Antonio said it would not contest the entry of an order prescribing a temporary rate of $20.00 per net ton, pending the institution and resolution of proceedings complying with the Court of Appeals' June, 1980 remand instructions and the statutory "cap" on San Antonio's rates at 162% of variable costs established in Section 203(c) of the Staggers Act. *Id.*

On December 30, 1980, the Commission issued a two-paragraph notice informing the parties that the Commission had voted not to suspend or investigate the Carriers' November 28 tariff filing. (Pet. App. Unpub. Filings No. 10). No findings or orders were set forth in this notice and the Commission expressed no opinion on the question whether the filed tariff itself acted to vacate the *San Antonio I* order. Accordingly, San Antonio continued to pay the *San Antonio I* rate. Thereafter, both San Antonio and the Railroads filed separate suits in United States District Court, with San Antonio's suit requesting that the court enforce the *San Antonio I* order and the Carriers asking the court to enforce the *San Antonio III* rate.[22] In addition, the Railroads filed a letter with the Com-

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[22] The cases were docketed in the District Court for the Western District of Texas, San Antonio Division *sub nom. San Antonio, Texas* v. *Burlington Northern, Inc.*, No. SA-81-CA-15 and *Southern Pacific Transportation Co.* v. *San Antonio, Texas*, No. SA-81-CA-71.

mission on January 19, 1981 followed on February 6, 1981 by a formal petition for clarification asking the Commission to issue an order making clear that the effect of the December 30, 1980 decision was to vacate the *San Antonio I* prescriptive order (Pet. App. Unpub. Filings Nos. 11 & 12). San Antonio replied on February 26, 1981. (Pet. App. Unpub. Filings No. 12).

While the Railroads' petitions for "clarification" were pending both at the ICC and before the Court of Appeals, the Railroads for the second time in less than four (4) months attempted to cut-off San Antonio's trains unless San Antonio prepaid the *San Antonio III* rate. Their newest prepayment tariff filing, bearing a March 15, 1981 effective date, was immediately challenged by San Antonio before the Commission. (Pet. App. Unpub. Filings No. 16). San Antonio also requested the United States District Court for the Western District of Texas, San Antonio Division to enjoin the Railroads from cutting off their service if San Antonio continued to pay the *San Antonio I* rate. After holding a hearing, the District Court entered a preliminary injunction on March 19, 1982 (which had been preceded by a temporary restraining order) preventing the Railroads from charging rates in excess of the *San Antonio I* rate level "until such time as the Interstate Commerce Commission enters a final appealable order based on the [Railroads'] request for a tariff increase and for prepayment." (App. to Cert. Petn. F-5). Meanwhile, the Commission voted not to suspend or investigate the prepayment tariff. (Pet. App. Unpub. Filings No. 18).

4. The Commission's April, 1981 vacation of the San Antonio I order and accompanying review proceedings

On April 7, 1981, the Commission served a decision responding to the Railroads' earlier petition for clarification. *San Antonio, Texas* v. *Burlington Northern, Inc.*, 364 I.C.C. 887 (Decided April 3, 1981) *("San Antonio V")* (App. to Cert. Petn. F). In this decision, the Commission said the issue whether the mandate of the Court of Appeals reinstated the *San Antonio I* rate prescription "is a question that is pending before that Court, and therefore we believe it would be inappropriate for

us to attempt to decide the matter." (App. to Cert. Petn. at F-6).[23] The Commission went on to hold that if the court decided the effect of its mandate was to reinstate *San Antonio I*, the Commission was not prohibited, prior to the issuance of the court's decision, to prospectively vacate the *San Antonio I* order to the extent it may have been revived. *Id.* at F-7. Without addressing any of the errors identified by the Court of Appeals in its decision reviewing *San Antonio II* and *III*, or determining whether the *San Antonio III* rate the Carriers wished to charge would result in a rate increase prohibited by Section 203(c) of the Staggers Act, the Commission proceeded to vacate the *San Antonio I* order because "there is little reason to believe that the *San Antonio I* rate prescription . . . is supported either by current cost data or by current legal standards." *Id.* Finally, the Commission announced that it would now reopen the San Antonio rate case "for the purpose of reconsideration of the maximum rate prescribed in *San Antonio III*, in accordance with the decision of [the Court of Appeals]." (*Id.* at F-11).[24]

San Antonio filed petitions seeking to stay the Commission's April 7 decision with the Commission and with the United States Court of Appeals for the Fifth Circuit. San Antonio argued that the Commission's April 7, 1981 order violated San Antonio's due process rights as no hearing had been held prior to the Commission's summary vacation of *San Antonio I* in *San Antonio V*, and that the burden on the Carriers of proving that the *San Antonio III* rates complied with Section 203(c) of the Staggers Act, had now been unlawfully shifted to San Antonio. The Railroads responded in opposition.

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[23] In a footnote, the Commission stated it now believed that the *San Antonio I* rate prescription was not reinstated as a matter of law following the Court of Appeals' decision vacating *San Antonio II* and *III*.

[24] In so holding, The ICC confirmed that its December 1980 and March 1981 investigation and suspension decisions did not in themselves operate to set aside the *San Antonio I* order.

On May 6, 1981, the Commission denied San Antonio's request for stay and its April 7 order became effective on May 7.[25] From May 7 onward, San Antonio has paid the freight rates set forth in the Carriers' tariffs. The current rate (as of January 1, 1982) stands at $26.16.

On June 19, 1981, the Fifth Circuit issued a ruling responding to San Antonio's request for a stay and, in the same decision, responded to petitions filed by the Railroads seeking to set aside the preliminary injunction entered by the Texas District Court in March, 1981. *San Antonio, Texas* v. *Burlington Northern, Inc.*, 650 F.2d 49, *clarified*, 652 F.2d 422 (5th Cir. 1981). In this decision, the Court of Appeals refused to stay the Commission's April 7 order on grounds that it was not ripe for review. *Id.*, 652 F.2d at 423. The 5th Circuit then vacated the District Court's injunction order based upon its determination that the District Court was without jurisdiction to enjoin the Carriers from filing tariffs. Like the ICC, however, the 5th Circuit left it to the Court of Appeals to decide whether its June, 1980 mandate had the effect of reinstating the *San Antonio I* order until that order was vacated by the Commission's April, 1981 *San Antonio V* order. *San Antonio, Texas* v. *Burlington Northern, Inc.*, *supra*, 650 F.2d at 52.

F. The Court Of Appeals' June, 1981 Decision Responding To The Carriers' Clarification Petition

On June 30, 1981, the Court of Appeals filed an opinion responding to the Railroads' *Petition For Clarification of Mandate*. In this opinion the Court of Appeals carefully examined the arguments of the parties and the precedents of this Court, and concluded that after its vacation of the *San Antonio II* and *III* orders "San Antonio I did continue in force pending further ICC action." (App. to Cert. Petn. A-3). The court stated that Petitioners all along could have petitioned the

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[25] Under the Act, Commission decisions become effective thirty (30) days after they are served, unless an earlier date is specified by the agency. 49 U.S.C. § 10327(h).

Commission to take "[s]uitable interim action" (*id.* at A-6) and noted that just such an interim petition (i.e. the Carriers' February 6, 1981 petition for clarification at the ICC) had resulted in the April 7, 1981 vacation of the *San Antonio I* order, thus leaving "[t]he manner . . . entirely in the hands of the Commission free of the orders in *San Antonio I, II* and *III*." *Id.* at A-6.

As for the time period between the issuance of the court's prior mandate and the effective date of the *San Antonio V* vacation decision, the court ruled that it was without jurisdiction to set aside the *San Antonio I* rate prescription order because to do so would be to "determine interim transportation policy" (*id.* at A-4) contrary to the express rulings of this Court in *Consolidated Rail*[26] and *Atchison, Topeka, supra*. Since the Carriers had failed to conform their tariffs to the reinstated *San Antonio I* rate prescription, the tariffs were declared to be "unlawful" (*id.* at A-3), not because the court reached an independent conclusion that the rates were unfair but because the legal effect of the reinstatement or revival of *San Antonio I* "has been to subject the railroads to the consequences of an earlier Commission finding that the higher tariffs are unreasonable." *Id.* at A-5 fn. 12. The Court of Appeals denied the Railroads' petition for rehearing on August 26, 1981 (App. to Cert. Petn. G). The Railroads then filed their petition for a writ of certiorari on November 24, 1981 and this Court granted the petition on March 1, 1982.

SUMMARY OF THE ARGUMENT

Petitioners' and Federal Respondents' principal allegation of error is that the Court of Appeals' June, 1981 decision responding to Petitioners' request for clarification constitutes "judicial ratemaking" in violation of the rulings of this Court in *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963) *("Arrow"); United States* v. *SCRAP*, 412 U.S. 669 (1973)

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[26] *Consolidated Rail Corp.* v. *Nat'l. Association of Recycling Industries, Inc.*, 449 U.S. 609 (1981).

("SCRAP"); Atchison, Topeka, supra and *Consolidated Rail, supra.* It is further alleged that the "judicial ratemaking" is contrary to the basic tenets of primary jurisdiction; to the "established scheme" of ratemaking set forth in the Interstate Commerce Act; and results in a violation of the "filed rate doctrine." None of these allegations of error is meritorious.

The Court of Appeals did not engage in judicial ratemaking because it did not make any subjective determination of what San Antonio's coal freight rates should be. Instead, it simply ruled that its vacation of the *San Antonio II* and *III* rate orders voided those orders and left the *San Antonio I* order—which was not before the court—as the governing ICC rate order until that order was vacated by the Commission in its April, 1981 *San Antonio V* decision. In analogous contexts, this Court has frequently recognized that the effect of the vacation of the second of two, successive orders is to reinstate "the last lawful administrative determination" (*Greene* v. *United States*, 376 U.S. 149, 161 (1964)) and that such a reinstatement does not constitute judicial ratemaking. *Chicago, Burlington & Quincy R.R.* v. *United States*, 242 F.Supp. 414 (N.D. Ill. 1965), *aff'd per curiam*, 382 U.S. 422 (1966); *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503 (1944); *Atlantic Coast Line R.R.* v. *State of Florida*, 295 U.S. 301 (1934); *Louisville & Nashville R.R.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925). The Court of Appeals' June 1981 decision explaining that the effect of its June 1980 mandate was to reestablish the "last lawful administrative determination" was clearly correct.

To sustain their charge of "judicial ratemaking," Petitioners are forced to invent the fiction that at the time the court issued its June, 1980 mandate there was no *San Antonio I* order left to enforce and by thus enforcing a non-existent rate order, the Court of Appeals erred. This argument is a classic example of counsel's attempt to rewrite the record to support a legal theory. It is entitled to no weight whatsoever because the ICC's *San Antonio I* order was not set aside by the ICC until May of 1981.

Petitioners' and Federal Respondents' arguments that the June, 1981 decision violated principles of "primary jurisdic-

tion" are both ironic and erroneous because these very parties *asked* the Court of Appeals to resolve the rate dispute between Petitioners and San Antonio and the ICC expressly held in its April, 1981 *San Antonio V* decision that the issue over the effect of the Court of Appeals' June, 1980 decision was a question of law for the court to decide. Similarly, contrary to the assertions of the Petitioners, the June, 1981 decision is fully consistent with the structure of the Act. Having correctly ruled that the effect of its June, 1980 mandate was to reinstate *San Antonio I*, the Court of Appeals' decision states that any relief from the alleged inequitites of that order must be obtained at the Commission. Petitioners' and Federal Respondents' position that, under the Act, the Court of Appeals should have somehow set aside the Commission's *San Antonio I* order to protect their alleged financial interests constitutes the very "judicial ratemaking" that has been rejected time and time again by this Court in other cases. *See, e.g., Atchison, Topeka, supra; Consolidated Rail, supra.*

Finally, Petitioners' and Federal Respondents' charges that the Court of Appeals violated the "filed rate doctrine" are wholly without merit. The Court of Appeals' ruling that rates charged in violation of the *San Antonio I* prescriptive order were unlawful is fully supported by the tenets of the filed rate doctrine incorporated into the Interstate Commerce Act as the Act expressly precludes carriers from charging and collecting rates that violate Commission prescriptive orders. 49 U.S.C. § 10704(a)(1).

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY DETERMINED THAT ITS VACATION OF THE *SAN ANTONIO II* AND *III* ORDERS LEFT *SAN ANTONIO I* AS THE GOVERNING ICC PRESCRIPTION ORDER

Between 1976 and 1980, the ICC issued three (3) prescriptive orders establishing maximum rates on coal moving to San Antonio, Texas: *San Antonio I*, *San Antonio II* and *San Anto-*

nio III. The *San Antonio II* and *III* orders expressly modified the *San Antonio I* order by authorizing successively higher prescriptive rate ceilings. In June, 1980, the Court of Appeals vacated *San Antonio II* and *III*. The clear effect of this action, as noted by the court in its June 1981 decision, was to reinstate the Commission's *San Antonio I* prescriptive order. The decision states in pertinent part:

> The *San Antonio I* order was superseded for a time by the Commission's *San Antonio II* and *III* orders, but with those orders vacated, *San Antonio I* did continue in force pending further ICC action.

(App. to Cert. Petn. A-3). By its terms, the *San Antonio I* order was to "continue in full force and effect pending further order of the Commission" (App. to Cert. Petn. E-14) and with the vacation of *San Antonio II* and *III*, there were no orders in "full force and effect" altering the initial prescription. Thus, as the Court of Appeals held, the *San Antonio I* prescription was reinstated upon the issuance of its mandate vacating *San Antonio II* and *III*.

Although Petitioners presented their "clarification" request to the Court of Appeals on grounds that "clarification" was "necessary to avoid further disputes" (*Petition For Clarification of Mandate, supra* at 10), they nevertheless have sought to continue this already protracted dispute by seeking redress in this Court because of their dissatisfaction with the answer they obtained to their question from the lower court. Here, Petitioners, now joined by the Federal Respondents, argue that the principal defect in the Court of Appeals' decision—a decision *they* asked the court to make—is that the decision somehow constitutes "judicial ratemaking"— a prohibited practice. Numerous side-bar arguments branch out from this initial premise of illegality. These multiple and interrelated assertions of error are without merit.

A. The Court Of Appeals Did Not Engage In Prohibited Judicial Ratemaking

Petitioners and Federal Respondents devote the lion's share of their briefs to their argument that the ruling of the Court of

Appeals runs afoul of this Court's rulings in *Arrow, supra; SCRAP, supra; Atchison, Topeka, supra* and *Consolidated Rail, supra*. Generally speaking, these cases stand for the proposition that the ICC, not the courts, is to determine the reasonableness of rail rates. *Arrow*, 372 U.S. at 668; *SCRAP*, 412 U.S. at 691-92; *Atchison, Topeka*, 412 U.S. at 821; *Consolidated Rail*, 449 U.S. at 612-613. The holdings in *Arrow* and *SCRAP*, which dealt with non-final ICC orders, were summarized by the Court in *In Re Trans Alaska Pipeline Rate Cases:*

> *Arrow* and *SCRAP* stand for two propositions: first, that federal courts have no power to enjoin rate changes before the Commission has finally determined the lawfulness of rates, see *Arrow, supra*, 372 U.S. at 669, 83 S.Ct., at 990; *SCRAP, supra*, 412 U.S., at 691, 93 S.Ct., at 2418; and second, that federal courts have no power to make 'an independent appraisal of the reasonableness of rates,' *Arrow, supra*, 372 U.S., at 670-671, 83 S.Ct., at 991; see *SCRAP, supra*, 412 U.S. at 692, 93 S.Ct. at 2418 . . .

Id., 436 U.S. 631, 638 n.17.

Atchison, Topeka and *Consolidated Rail* each involved instances where federal courts vacated final Commission orders approving carrier rate increases and then enjoined the increases set forth in the vacated approval orders. Relying on *Arrow* and *SCRAP*, this Court set aside the injunctions in both cases because under the Act "[c]arriers may put into effect any rate that the Commission has not declared unreasonable" (*Atchison, Topeka*, 412 U.S. at 819) and because the injunctions in these cases were found to constitute an "independent appraisal of the reasonableness of rates" (*Arrow, supra*, 372 U.S. at 670-71) which interfered with the "primary jurisdiction of the Commission" to determine rail rate reasonableness. (*Consolidated Rail*, 449 U.S. at 612, *quoting Atchison, Topeka*, 412 U.S. at 822).

Contrary to the characterizations made by the Railroads and Federal Respondents, the Court of Appeals did not engage in prohibited judicial ratemaking. In its decision, the Court of Appeals did not make "an independent appraisal" of San Antonio's coal rate level, nor did it enjoin any rates the "Commission

has not declared unreasonable." What the court did rule, after a lengthy discussion of *Atchison Topeka and Consolidated Rail* was that the effect of its vacation of the *San Antonio II* and *III* orders was to subject the Carriers to a pre-existing Commission order *(San Antonio I)* in which the Commission had expressly and finally declared, after its appraisal of the facts, what the lawful maximum rates were on San Antonio's coal traffic. Thus, as correctly found by the court below, the pivotal distinction between the situations in *Consolidated Rail* and *Atchison, Topeka* and the situation here is the presence of a pre-existing Commission rate order that did control the maximum reasonable rate. Said the Court of Appeals:

> To be sure, in *Consolidated Rail* and in *Atchison, Topeka* the Court's vacation of the Commission's order had the practical effect of enabling the railroads to continue with their already-filed tariffs; no outstanding Commission order prevented them from so doing. In the present case, on the other hand, the effect of our vacation of the Commission's orders has been to subject the railroads to the consequences of an earlier Commission finding that the higher tariffs are unreasonable. This difference in practical effect, however, is not the result of some action by this court, but the consequence of a preexisting ICC order forbidding higher tariffs.

(App. to Cert. Petn. A-5). Neither *Consolidated Rail, Atchison Topeka, SCRAP, Arrow* or any of the other cases cited by Petitioners to build their "judicial ratemaking" charge involved a situation where the orders vacated by the courts modified an earlier order not before the court. Furthermore, the Court of Appeals' decision that the result of this vacation was to maintain the binding force of the earlier order *(San Antonio I)* is amply supported by the precedents of this Court, which have never suggested that such a result constituted prohibited "judicial ratemaking."

The Court has often acknowledged that the consequence of vacating an administrative order is to render the vacated order without further force and effect. *See, e.g., Atchison, Topeka, supra,* 412 U.S. at 818; *United States* v. *U.S. Smelting,* 339 U.S. 186, 198 (1950); *cf. SEC* v. *Chenery Corp.* 332 U.S. 194,

200-01 (1947); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 144-45 (1940); *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373-74 (1939).[27] In *Greene* v. *United States*, 376 U.S. 149, 161 (1964) *("Greene")*, this Court had occasion to discuss this principle in the context of a proceeding such as this one where the agency had issued two orders, the second of which was vacated by the reviewing court. There, the Court ruled that judicial vacation of the second administrative order "reinstate[d] the last valid administrative determination . . . ." *Id.*, 376 U.S. at 161. "Reinstat[ing] the last valid administrative determination" is precisely what the Court of Appeals' June 1980 mandate clearly did, as confirmed in the court's June 1981 decision and as all concerned but the Railroads recognized at the time.

Although the multiple order situation of the type here presented rarely appears in the reported cases (perhaps because parties have acknowledged the logic embodied in this Court's *Greene* decision), a careful search of the precedents has revealed several cases involving situations analogous to the one addressed by the Court of Appeals.

The first of these multiple order cases is *Louisville & Nashville R.R.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925) *("Sloss-Sheffield")*. In *Sloss-Sheffield*, the ICC had issued an order requiring the railroad to pay the Sloss-Sheffield Company a stated sum as reparations for the carriers' charging unlawfully high freight rates. The reparation order was subsequently modified in a Commission order that re-

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[27] The cases follow the general rule of administrative cases that:

> Where an administrative decision or order is reversed or vacated and remanded, the case stands as if no decision or order had ever been made . . . .

73 C.J.S. *Public Administrative Bodies and Procedure*, § 242 (1951). *Accord*, 2 Am. Jur. 2d *Administrative Law* § 762 (1962) (a vacated administrative order "cannot be enforced by the administrative agency against the complaining party." *Id.*) The rule involving the effect of vacating an administrative order is similar in this respect to that involving the reversal by an appellate court of a lower court's judgment. Once reversed, such judgments are "without any validity, force, or effect . . . . ." *Butler* v. *Eaton*, 141 U.S. 240, 244 (1891).

duced the reparation award. Before this Court, the Louisville and Nashville argued that the reduction order was invalid because it had been unlawfully issued without proper notice. In response, this Court stated, *inter alia:*

> If lack of notice to the Louisville & Nashville rendered the later order void, *the original order remained in full force and effect.*

Id., 269 U.S. at 225 (emphasis added).

A similar resolution occurred during the litigation leading up to this Court's decision in *Atlantic Coast Line R.R.* v. *State of Florida*, 295 U.S. 301 (1935) *("Atlantic Coast Line").* In that litigation, the Florida Railroad Commission issued an order prescribing maximum intrastate rates on logs. The prescriptive order was subsequently set aside by the ICC, whose vacation order in turn was set aside by the courts. *State of Florida* v. *United States*, 282 U.S. 194 (1931). As a result of this judicial action, the original rate order entered by the Florida Railroad Commission "was restored and became effective . . . ." *State of Florida* v. *United States*, 292 U.S. 1, 3 (1934); *Georgia Pub. Serv. Comm'n.* v. *Atlantic Coast Line R.R.*, 186 I.C.C. 157, 160 (1932). The dissenting opinion in the *Atlantic Coast Line* decision (by Justice Roberts, with Chief Justice Hughes and Justices Brandeis and Stone concurring) explains that this Court denied a motion by the rail carrier asking the Court to enforce the rates prescribed in the vacated ICC order "for the obvious reason that neither we nor the court below could authorize the railroads to persist in charging rates which had been fixed by a void order." *Id.*, 295 U.S. at 324. Thereafter, the ICC reopened the case, conducted further hearings and issued a second order vacating the reinstated state-prescribed rates; this second order was upheld in *State of Florida* v. *United States*, 292 U.S. 1, *supra*, and restitution of monies paid pursuant to the originally vacated ICC order was denied in *Atlantic Coast Line, supra.*

This Court next encountered a multiple administrative order situation in *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503 (1944). There, the ICC first prescribed a passenger fare of 8¢. In subsequent orders, the Commission

authorized increases first to 9¢ and then to 10¢. The orders modifying the initial 8¢ prescription order were challenged in district court and the court set aside the Commission's 9¢ and 10¢ orders. This Court reversed the lower court's decision on grounds that the ICC's 9¢ and 10¢ orders were properly entered, but held that the effect of the district court's decision, until it was set aside, was "to continue the 8-cent rate fixed in 1938." *Id.*, 322 U.S. at 512.

The most recent multiple-ICC order case is *Chicago, Burlington & Quincy R.R.* v. *United States*, 242 F. Supp. 414 (N.D. Ill. 1965), *aff'd per curiam*, 382 U.S. 422 (1966). There, the District Court vacated an ICC order which in turn had set aside earlier ICC orders prescribing grain rates, "all without prejudice to further proceedings before or by the Interstate Commerce Commission . . . ." *Id.*, 242 F. Supp. at 417. On remand, the Commission acknowledged that the effect of the court's vacation was to reinstate its initial prescriptive orders pending further ICC determination. *Rate Structure Investigation, Part 7, Grain and Grain Products Within the Western District and For Export*, 329 I.C.C. 824, 826 (1967).

In none of these four cases involving vacation of successive ICC rate orders did the Court mention or suggest that the resultant reinstatement of the last lawful ICC rate order would constitute prohibited "judicial ratemaking." These cases fully support the principle that the effect of vacating an ICC modification order is to reinstate the "last valid administrative determination." *Greene*, *supra*. The lower court's holding that vacation of the *San Antonio II* and *III* modification orders reinstated *San Antonio I*, the "last lawful administrative determination," is thus fully consistent with the precedents of this Court and does not constitute prohibited "judicial ratemaking."

B. Petitioners' And Federal Respondents' Attempt To Construe Away *San Antonio I* Ignores Reality

In recognition of the fact that their entire charge of judicial ratemaking collapses once it becomes apparent that it was the last lawful ICC rate order *(San Antonio I)*—not the subjective

judgment of the Court of Appeals—that established the effective prescriptive rate following the vacation of the *San Antonio II* and *III* modifying orders, the Railroads and Federal Respondents have jointly crafted a novel theory which does away with the existence of the *San Antonio I* order.[28] By enforcing a non-existent rate order, the court below engaged in judicial ratemaking. The syllogism used to support this theory is as follows:

> (1) In *San Antonio II* and *III*, the ICC made two separate and distinct decisions:
>
> > (i) it found the *San Antonio I* rate to be too low and "lifted" *San Antonio I*, thus rendering that prescription order without further force and effect, and
> >
> > (ii) it prescribed a new rate higher than *San Antonio I;*
>
> (2) No one challenged the Commission's first decision to "lift" *San Antonio I* before the Court of Appeals and the court did not rule on this issue;
>
> (3) Because the court did not rule on the "lifting" action, it vacated the *San Antonio II* and *III* orders only "in part," setting aside the maximum rate ceiling, but leaving intact the Commission's decision to "lift" *San Antonio I*.

Through their syllogism, the Carriers attempt to "construe-away" the Commission's *San Antonio I* rate order, and thereby clear the way for the application of the *Atchison, Topeka* and *Consolidated Rail* rule. However, the syllogism is really nothing more than an effort by the parties to change what happened in the proceedings below to fit their newest theory because each of its three (3) constituent parts has no basis in fact.[29]

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[28] At page 26 of their brief, the Railroads assert that *San Antonio I* had been "lifted" whereas the Federal Respondents' brief characterizes its existence as a "faulty premise." (Pp. 16, 25).

[29] It merits re-emphasis that this is a relatively new theory. At the outset the Carriers sought to avoid the constraints of the *San Antonio I* rate order not on the theory here advanced that it had been

First, the Commission's *San Antonio II* and *III* decisions will be searched in vain for any language that "lifts" or vacates the *San Antonio I* rate prescription. These decisions and orders repeatedly refer to the ICC's action as one of "modification," not vacation. Thus, the pivotal text of the *San Antonio II* order recites:

> It is ordered:
>
> 1) That defendants are permitted to establish a rate not exceeding $16.12 per net ton, and our prior order is modified accordingly.

(App. to Cert. Petn. D-20). Similarly, in *San Antonio III*, the Commission expressly made "modifications" (App. to Cert. Petn. C-17) to its *San Antonio II* order and prescribed a higher rate ceiling than the one it had authorized in *San Antonio II*.

It is universally recognized that a modification order presupposes the existence of an order to be modified, whereas a vacation order obliterates the order vacated.[30] The recognized definitional distinction between modification and vacation of a rate prescription order is well known in commerce law, and the Railroads and the Federal Respondents are well aware that these terms are not one and the same. Vacating a prescription

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"lifted," but on their persistent insistence that their rates to San Antonio were carrier-made as in *Atchison, Topeka* and *Consolidated Rail* and not prescribed as in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932). *See, e.g.*, J. App. at 12; *Petition for Clarification of Mandate, supra*, at 12-13.

[30] As used in its ordinary sense a modifying order "does not confer the power to destroy." 58 C.J.S. *Modify* p. 840 (1948). A vacating order, on the other hand, renders the Act vacated "void." *Black's Law Dictionary* p. 1388 (Rev. 5th Ed. 1979). This Court has recognized that consistent with their "usual meanings" the term modify is not the equivalent of revocation or vacation. *Porter* v. *Commissioner of Internal Revenue*, 288 U.S. 436, 443 (1933). *Accord, Chicago, M and St. P. Ry.* v. *Hormel Co.*, 240 Fed. 381, 384 (8th Cir. 1917), *cited with approval on this point in Louisville & Nashville R.R.* v. *Sloss-Sheffield Steel & Iron Co., supra*, 269 U.S. at 225.

order restores pricing freedom to the railroad, subject to the Commission's powers of suspension and investigation authorized under Act § 10707. *See, e.g., Southwestern Millers' League* v. *Atchison, T. & S.F. Ry.*, 364 I.C.C. 724, 729-30 (1981); *Consolidated Rail Corporation—Petition to Eliminate Docket No. 28300 Class Rate Prescription*, 264 I.C.C. 615, 620-21 (1981); *Rate Structure Investigation Part 7, Grain and Grain Products Within the Western District and For Export*, 329 I.C.C. 824, 845 (1967). On the other hand, the modification of the order, as was done in *San Antonio II* and *III*, provides that the prescriptive ceiling on the rates remains intact and precludes the carrier from exercising voluntary pricing freedom free from ICC control. Specifically, the carrier is not free to simply file new rates in excess of the prescribed maximum, but must conform its tariffs to the prescribed maximums. *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 387-388 (1932) *("Arizona Grocery")*.

Recognizing this distinction in their procedural maneuverings at the ICC prior to the *San Antonio II* decision, the Carriers repeatedly implored the Commission to vacate *San Antonio I* so that they could unilaterally formulate coal rates to San Antonio. The Commission thwarted the Railroads' efforts and issued an order expressly rejecting the Carriers' request for a summary vacation of *San Antonio I*. *San Antonio, Texas* v. *Burlington Northern, Inc.*, No. 36180 (Decision served Jan. 3, 1978) (D.C. Cir. J. App. II, 642). Eventually, in its *San Antonio II* and *III* decisions, the Commission expressly modified its *San Antonio I* prescription (App. to Cert. Petn. D-14), rather than vacating or lifting it as is now argued by the Carriers and the Federal Respondents. Only one Commissioner evidenced any support whatsoever for the requested vacation of *San Antonio I*. (App. to Cert. Petn. D-19). [31]

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[31] In fact, the Commission took no action to vacate the prescriptive ceiling first established in *San Antonio I* until its April 1981 decision in *San Antonio V*. Its order states that the *San Antonio I* order "shall have no further force and effect" (App. to Cert. Petn. F-11) and its supporting opinion expressly acknowledges that the effect of this

While the *San Antonio II* and *III* orders contain no language of vacation, Petitioners seize upon the Commission's rulings in *San Antonio II* that the *San Antonio I* rate was too low based on evidence concerning "comparable rates" and the "guidelines of the *4-R Act*" (Brief at 29) as supporting their vacation theory. However, in *San Antonio II* the Commission expressly held that "the rate comparisons of record do indicate that . . . a *modification* is warranted." (App. to Cert. Petn. D-5, (emphasis added)). Similarly, the Commission ruled "the ratemaking guidelines contained in the *4-R Act* require a *modification* of the rate. . . ." *Id.* at D-14 (emphasis added). Thus, the very discussions relied upon by the Railroads clearly refute their vacation theory.

Second, Petitioners' allegation that no one challenged the "lifting" of *San Antonio I* before the court below because no one challenged the Commission's findings that *San Antonio I* was "too low" (Railroads' Brief at 29) is sheer fantasy. It is clear beyond dispute that San Antonio's position both before the Commission and the Court of Appeals was that no change in the prescribed *San Antonio I* rate prescription was justified. Before the Court of Appeals, Petitioners acknowledged that San Antonio opposed "modification of any part of the prescribed [*San Antonio I*] rate." (Brief of Railroad Respondents-Intervenors at 36 (December 19, 1979), *San Antonio, Texas* v. *United States*, 631 F.2d 831 (D.C. Cir. 1980)). Their current position that San Antonio did not oppose the modification of *San Antonio I* is simply a misrepresentation. Similarly, the comparable rate and 4-R Act "findings" Petitioners say San Antonio did not challenge (Brief at 29) were in fact the focal point of San Antonio's attack on the ICC's decisions before the Court of Appeals. (App. to Cert. Petn. B-9 - B-11; B-31 - B-41).

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vacation is to restore unconstrained "ratemaking initiative" (*id.* at F-7) to the Carriers. One need only compare the language in these two orders to determine that *San Antonio II* and *III* contain no vacating or lifting language as the Petitioners would wishfully lead the Court to believe.

Third, the Court of Appeals did not set aside the *San Antonio II* and *III* orders "in part," (i.e. leaving the Commission's alleged vacation of *San Antonio I* intact) as specifically requested by Petitioners in their petition for review. Thus, even if the Petitioners were correct in their assertion that the *San Antonio II* and *III* orders did vacate *San Antonio I*, the fact that the court rejected the partial vacation sought by Petitioners necessarily operated to set aside any *sub silentio* findings in *San Antonio II* and *III* that operated to vacate *San Antonio I*.

Because each of the three (3) theories developed by Petitioners to wipe-out *San Antonio I* is without merit, their main position before the Court is defective for its entire validity is dependent upon the eradication of *San Antonio I*. Stated differently, all of the verbiage in the briefs of Petitioners and Federal Respondents about the application of the *Consolidated Rail* rule, etc., is dependent for its validity in this case upon the elimination, somehow, of the *San Antonio I* order. Because that order cannot be eliminated by counsel's ingenuity, the Petitioners' case of "judicial ratemaking" must fall.

C. The Court Of Appeals' Decision Is Consistent With The Principles Of Primary Jurisdiction

With chameleon-like ease, the Petitioners and Federal Respondents augment their "lifting" argument with the accusation that the Court of Appeals violated established principles of "primary jurisdiction" by reaffirming in its June, 1981 decision that its June, 1980 vacation order reinstated *San Antonio I*. Petitioners and Federal Respondents assert that the resolution of the effect of the court's mandate should never have been decided by the court, but instead should have been "referred" to the Commission. (Petitioners' Brief at 30-32; Federal Respondents' Brief at 31-32).

The novel position espoused by Petitioners and Federal Respondents is baseless. In the first place, it was the Petitioners who asked the Court of Appeals to "clarify" its June, 1980 mandate by deciding whether or not that mandate had the effect of reinstating *San Antonio I*.[32] The Petitioners' and Federal Respondents' new position constitutes a classic "set-up" wherein a party asks a court to resolve a dispute, and, when the court responds adversely to the requesting party, the party attempts to argue that the very act of decision-making—the *act* requested by the party—was unlawful. What the position of the Petitioners and Federal Respondents boils down to is that the Court of Appeals had jurisdiction to decide their clarification petition only one way—*their way*.

Moreover, the actions taken by the court below are clearly consistent with the primary jurisdiction doctrine. That doctrine holds that courts should defer factual questions to an agency where obtaining the agency's views would assist the court in resolving the legal questions presented to it. *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 303-307 (1976); *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 63-70 (1956). Here, there was no need to refer any questions to the agency because the questions before the court were ones of law. Moreover, the Commission had fully informed the court of its shifting legal views as to whether the *San Antonio I* rate was reinstated after the issuance of the court's June, 1980 mandate. Initially, the Commission took the position that the legal effect of the court's vacation of *San Antonio II* and *III* was to reinstate *San Antonio I*. This position was adopted in the Commission's November, 1980 decision in I&S No. 9253, *supra*, and espoused in detail in the Commission's response to the lower court in reply to the Railroads' clarification petition. (J. App. 19-24). Therein, the Commission argued that the Court of

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[32] It bears repetition that this request was made immediately *after* the ICC had ruled in a fashion *identical* to that which the lower court would eventually rule.

Appeals' vacation order acted to "reinstate the last valid prescribed rate that was not vacated by a court" (*id.* at 20), *i.e.*, the *San Antonio I* rate. The Commission also said that the court's decision affirming that *San Antonio I* was reinstated would not constitute judicial ratemaking but would merely confirm that the "last valid" (*id.*) Commission prescription would remain in effect "until the railroads successfully petition the Commission to set the prescription aside." *Id.* at 21.

Thereafter, to be sure, the Commission changed its interpretation in an obscure footnote inserted into its *San Antonio V* order wherein the Commission argued that the legal effect of the vacation of *San Antonio II* and *III* was not to reinstate *San Antonio I*.[33] However, even though its legal position had shifted, the Commission took the position that:

> Whether the effect of the court of appeals decision was to reestablish the *San Antonio I* prescription as a matter of law is a question that is pending before the court, and *therefore we believe it would be inappropriate for us to attempt to decide the matter.*

(App. to Cert. Petn., F-6) (*emphasis added*). The court was informed of the Commission's *San Antonio V* decision and the change of legal positions taken therein by the agency. (App. to Cert. Petn. A-3).

Thus, the ICC expressly disavowed that resolution of the question answered in the court's June, 1981 decision was within its primary jurisdiction, and expressly confirmed that the question was within the primary jurisdiction of the court.[34]

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[33] In this footnote (App. to Cert. Petn. F-6 n.3), the Commission argued that "[u]pon further consideration" it believed that the existence of the *San Antonio I* order was, in its new legal opinion, not "material" and that in light of this new opinion, it agreed with the Railroads that reinstatement of the *San Antonio I* rate was not legally permissible. *Id.*

[34] Indeed, in this context it is most ironic that Federal Respondents should accuse the Court of Appeals of setting "interim transportation policy" between July 1980 and May, 1981, when the ICC's "policy" during this time first held that the *San Antonio I* order was rein-

This circumstance provides further affirmation that the lower court acted in a fashion fully consistent with the primary jurisdiction doctrine.[35]

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stated as matter of law (see I&S Docket No. 9253, *supra*) and later that took the form that the issue whether the *San Antonio I* rate order was reinstated was a legal question for the court to decide.

[35] In their *Reply to San Antonio's Brief In Opposition to The Petition For Writ of Certiorari* (though not in their opening brief on the merits) the Petitioners argued that the decision of the Fifth Circuit in *San Antonio, Texas* v. *Burlington Northern, Inc.* 650 F.2d 49, *clarified*, 652 F.2d 422 (5th Cir. 1981) conflicts with the decision under review because, according to the Railroads, the Fifth Circuit's decision requires the conclusion that the Court of Appeals had no jurisdiction to find the *San Antonio I* rate was reinstated, i.e. to respond to the Railroads' petition for clarification. A review of the Fifth Circuit's decision reveals that the court's ruling and analysis were totally focused upon the issue of whether the district court's *injunction* preventing the Railroads from forcing payment of the tariff rate transgressed upon the Commission's "sole and exclusive power to suspend." *Id.*, 650 F.2d at 53, quoting *Arrow*, *supra*, 372 U.S. at 667. The question raised by the Railroads before the Court of Appeals in contrast clearly did *not* involve an "injunction" or "suspension" situation.

Aware of this clear distinction between the Fifth Circuit's decision and the Court of Appeals' decision, the Railroads suggest in their Reply that it is a matter of no significance whether a court "enjoins" a rate the ICC has refused to suspend, or simply declares a rate contained in a filed tariff to be inconsistent with an order of the Commission. The Railroads' argument completely ignores the very clear reliance of the Fifth Circuit upon the prohibition against affirmative judicial action *in the form of injunctive relief* as expressed in *Arrow*, *SCRAP*, and *Consolidated Rail*, all of which involved a lower court's entry of an injunction. The D.C. Circuit did not enjoin the Railroads from charging the tariff rate. It simply declared that that rate was inconsistent with the outstanding Commission order in *San Antonio I* and was, therefore, unlawful.

It is clear that the Fifth Circuit's ruling or analysis cannot be extended, as the Railroads have attempted, to the distinct and differ-

D. The Interstate Commerce Act Directs The Conclusions Reached By The Court of Appeals

The Railroads and Federal Respondents also raise a bevy of subsidiary arguments intended to demonstrate that the Court of Appeals' "judicial ratemaking" should be set aside because it conflicts with the "ratemaking scheme prescribed in the Interstate Commerce Act." (Federal Respondents' Brief at 32). None of the arguments can serve as a basis for reversing the lower court's decision.

1. The Court of Appeals correctly ruled that the Act requires the Commission, not the court, to set aside *San Antonio I*

The principal "conflict" asserted by Petitioners and Federal Respondents between the Court of Appeals' June 1981 decision and the provisions of the Act is that the decision is "patently unfair" (Railroads' Brief at 19) to the Railroads. This alleged unfairness arises because the effect of the Court of Appeals' decision is to preclude Petitioners from obtaining sums (estimated at $19+ million) they claim are due them for the rates they attempted to collect from San Antonio in excess of the *San Antonio I* level. While this certainly is the direct consequence of the court's decision, the court correctly held that it had no power under the Act to set aside this alleged inequity. Having ruled that the legal effect of the June, 1980 vacation order was to reinstate the *San Antonio I* order, the "last lawful administrative action," (*Greene, supra*) the court held that it was

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ent factual situation and issue before the Court of Appeals. Assuming *arguendo* that the Fifth Circuit's decision could properly be interpreted as the Railroads have argued it should be, that decision would be incorrect for all of the reasons discussed in this brief. Indeed, although it is irrelevant to the resolution of the issues before this Court, the correctness of the Fifth Circuit's decision concerning the district court's injunction is very dubious given the fact that it effectively nullifies Section 11705(a) of the Act (49 U.S.C. § 11705(a)), which permits shippers to bring civil actions to enforce ICC orders. *Id.*

powerless to set aside this rate prescription order for to do so would result in the very judicial ratemaking and establishment of "interim transportation policy" (App. to Cert. Petn. A-4) that the *Atchison Topeka* and *Consolidated Rail* cases say is exclusively within the province of the ICC.

The charges of "patent unfairness" and "irreparable injury" leveled by Petitioners at the court's decision are in reality criticisms of the operation of the Act itself. As they themselves recognize, once the ICC prescribes a freight rate, the statutory scheme prohibits the carriers from ever obtaining refunds, even if the Commission's order is set aside by the courts and the Commission ultimately establishes a rate higher than that initially prescribed. (Railroads' Brief at 27.) Thus, *any time* the Commission prescribes a maximum rate less than the railroads wish to charge, they are "irreparably injured" in the sense that they cannot recoup money in excess of the prescription. Once the railroads have abused their pricing freedom and the Commission prescribes a rate instead, as is here the situation, the Act places the burden on the railroads to have that order set aside in proceedings before the Commission resulting in a modification or vacation order entered after a "hearing." *Arizona Grocery*, *supra*, 284 U.S. at 387; *Free Time on Export Traffic, U.S. Ports*, 346 I.C.C. 379, 391-392 (1974) (where railroads seek to file tariffs that violate an outstanding Commission prescription order, "the appropriate procedure is to seek a modification of the order prior to the filing of the tariff." *Id.* at 392 (footnote ommitted)). *Accord Southwestern Millers' League* v. *Atchison, T. & S.F. Ry.*, *supra*; *Consolidated Rail Corporation—Petition to Eliminate Docket No. 28,300 Class Rate Prescription*, *supra*; *The Fifteen Percent Case*, 45 I.C.C. 303, 325 (1917).[20] Certainly, the Court of Appeals was not equipped to hold such a hearing, and it correctly ruled that the Carriers should go to the ICC to correct any perceived unfair-

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[20] Federal Respondents concede that *Arizona Grocery* "describes the procedures that a carrier *must* follow to modify a Commission rate prescription." (Brief at 26) (emphasis added).

ness in the Commission's *San Antonio I* rate order.[47] Indeed, this is precisely what the Carriers knew, understood, and did at the outset of their efforts to alter *San Antonio I*.

As a supporting contention to their arguments of unfairness, Petitioners and Federal Respondents continually refer to the *San Antonio I* order as "outdated," "obsolete," "issued in a substantially different legal and economic environment" and "too low."[48] Whether the *San Antonio I* rate is low, high or just right is a matter which is the subject of a bitter dispute in ongoing proceedings at the ICC. There is no suggestion that it is confiscatory, however, and both the Eighth Circuit and the ICC have recognized its profitability. When the prescription was first imposed in 1976, Federal Respondents' repeatedly emphasized the "handsome contribution" the rate made to the Carriers' system-wide profits.[49] After 1976, the rate was repeatedly increased by amounts which exceed the rate of inflation, (*see* Addendum) and, while it is clear that the Railroads desire a higher rate, that fact does not support the contention that the *San Antonio I* rate is too low.[50] The ICC itself, despite repeated efforts, has failed to satisfy any reviewing court that its changed and exaggerated views of reasonable rail rates, as exemplified in the *San Antonio II* and *III* decisions, have a

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[47] This Court has often ruled that if carriers believe that ICC orders are unfair, they can "apply to the Commission for modification of the order. . . ." *Chicago and North Western Ry.* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 326, 367 (1967), *quoting Akron, C. & Y. Ry.* v. *United States*, 261 U.S. 184, 194 (1923).

[48] *See, e.g.*, Railroads' Brief at 29; Federal Respondents' Brief at 9, 14.

[49] *Joint Brief of the Interstate Commerce Commission and the United States* at 27, *Burlington Northern, Inc.* v. *United States*, 555 F.2d 637 (8th Cir. 1977).

[50] The *San Antonio I* rate is well above rate levels subsequently approved by the ICC in other proceedings in orders affirmed by the courts. (J. App. Unpub. Filings No. 8 at 19).

rational basis." To this very day, the ICC is without a judicially-approved measure of maximum coal rate lawfulness. The ICC's demonstrated inability to cope with the coal rate question entitles its opinion on the *San Antonio I* rate level to little credence.

2. The decision below does not promote regulatory lag or impede carriers' rights to seek review of ICC rate orders

Contrary to Petitioners' and Federal Respondents' assertions, the Court of Appeals' decision does not promote "regulatory lag," or chill the Railroads' rights to challenge rate orders they dislike in the courts. What the court below said to the Carriers was go to the ICC if you are dissatisfied with *San Antonio I* and have the ICC hear your case. Given the fact that the Commission vacated the *San Antonio I* order without the benefit of a prior hearing by simply issuing a perfunctory opinion (*San Antonio V*), it appears as if the Carriers could have obtained an order vacating *San Antonio I* even before the July, 1980 mandate of the court was issued. The "lag" that occurred was due to the fact that the Carriers first attempted various unsuccessful legal maneuvers before finally asking the ICC to set aside *San Antonio I* in February of 1981. (Pet. App. Unpub. Filings No. 12). Even then, the Commission took quick action and vacated *San Antonio I* in April of 1981. Thus, much of the "lag" in this case is attributable to the failure of the Railroads themselves to seek to have *San Antonio I* set aside.

Similarly, the reinstatement of the *San Antonio I* order is not a precedent that will "chill" the railroads' right to appeal modification orders. Carriers are always free to ask a court to set aside modification orders in a fashion that retains that part of the order they like (*see, e.g.*, the very Petition filed by the

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[6] Every case where the ICC used the rate formula it employed in *San Antonio II* and *III* has been set aside by the courts after judicial review. *See, e.g., Iowa Public Service Co.* v. *ICC*, 643 F.2d 542 (8th Cir. 1981); *System Fuels, Inc.* v. *United States*, 642 F.2d 112 (5th Cir. 1981); *Union Pacific R.R.* v. *United States*, 637 F.2d 764 (10th Cir. 1981).

Railroads before the Court of Appeals).[6] Moreover, judicial review would be a hollow exercise for San Antonio if the only consequence of securing the vacation of the *San Antonio II* and *III* orders would be the speculative protection of refunds. Having started this proceeding in 1975 and having obtained a judicially approved prescription order (*San Antonio I*), San Antonio was entitled under the Act to the protections set forth in that order while it remained in full force and effect. *Arizona Grocery*, *supra*. That is why San Antonio asked the court below to vacate the unlawful modifying orders and why the court vacated *San Antonio II* and *III*.

II

THE COURT OF APPEALS CORRECTLY RULED THAT RATES CHARGED IN VIOLATION OF THE *SAN ANTONIO I* PRESCRIPTIVE ORDER WERE UNLAWFUL

Petitioners' and Federal Respondents' final contention holds that even if the Court of Appeals correctly ruled that the *San Antonio I* prescription order was in effect between July of 1980 and May of 1981, the Court of Appeals still erred in holding that rates filed by the Carriers in excess of the prescribed maximums, and therefore in direct violation of the Commission's order, were "unlawful." (App. to Cert. Petn. A-3). The sole

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[6] At various points in their brief, Petitioners acknowledge that their true problem with the court's June, 1981 decision is that it did not change its June, 1980 mandate by turning a full vacation order into a vacation "in part" order. (*E.g.* Railroads' Brief at 30). However, there is no question that the Court of Appeals could have vacated the orders before it *in toto* under 28 U.S.C. § 2349 (ICC order may be set aside "in whole or in part." *Id.*). Because of their shifting legal positions, Petitioners never urged the court to vacate the *San Antonio II* and *III* orders "in part" on brief even though they originally requested such relief in their petition for review, and in other cases the courts, upon request, have remanded, without vacating, ICC coal rate orders. *See e.g., Celanese Chemical Co. v. United States*, 632 F.2d 568 (5th Cir. 1980), cert denied, 453 U.S. 950 (1981).

ground upon which they rely to support their claim of error is the "filed rate doctrine."[4] Under the reading Petitioners graft on to this doctrine, filed rates that are higher than maximum rates prescribed by the ICC are "lawful" rates and railroads are free to circumvent the express orders of the Commission prescribing maximum rates simply by filing tariffs with the agency that establish higher rate levels. (Railroads' Brief at 40-43; Federal Respondents' Brief at 34-39). Nothing in the filed rate doctrine permits such patent disregard for the Commission's orders and the Court of Appeals correctly ruled that tariffs filed in violation of the Commission's outstanding *San Antonio I* order were "unlawful."

A. The Act Expressly Forbids Railroads From Publishing Or Collecting Rates In Excess Of Those Prescribed By The Commission

Petitioners and Federal Respondents are flatly wrong in asserting that even if carriers deliberately file rates in excess of those prescribed in a Commission order, the filed rates establish the "lawful" rate that shippers must pay. The Act provides that once the Commission prescribes a rate "the affected carriers *may not* publish, charge or collect a different rate . . . ." 49 U.S.C. § 10704(a)(1) (emphasis added). As explained by this Court in *Arizona Grocery, supra:*

> Specific rates prescribed for the future take the place of the legal tariff rates theretofore in force by the voluntary action of the carriers, and themselves become the legal rate. As to such rates, there is therefore no difference between the legal or published tariff rate and the lawful rate. The carrier cannot change a rate so prescribed and take its chances of an adjudication that the substituted rate will be found reasonable. It is bound to conform to the order of the Commission. If that body sets too low a rate, the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future.

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[4] The "filed rate doctrine" was first so named in *Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) ("*Arkansas-Louisiana*").

Id. 284 U.S. at 387-88.

The Court's admonition in *Arizona Grocery* that carriers must abide by the Commission's orders sets forth an underlying precept of all administrative law. It would subvert the very basis of administrative authority if carriers could circumvent outstanding ICC orders simply by declaring they did not like them and by filing tariffs to that effect. Federal law requires carriers to "obey the order so long as it remained in effect." *Seaboard Airline R.R. v. Daniel*, 333 U.S. 118, 123 (1944). Elsewhere, Petitioner Burlington Northern Inc. has candidly apprised this Court that it must obey prescriptive orders. In its brief in the *Iowa* case, BN told the Court:

> The facts of *Arizona Grocery* are remarkably similar to those of the present case. In both cases, the Commission originally prescribed a rate as a maximum, and the carrier was obligated by law to charge, and did charge, no more than that rate until such time as the Commission entered another order changing that rate.

(Brief of Petitioner at 26, *Burlington Northern, Inc. v. United States*, No. 81-755, *cert. denied*, ____ U.S. ____, 102 S.Ct. 1253 (1982).

Thus, as was recently reaffirmed by Petitioner Burlington Northern, Inc., it is unlawful for carriers to "publish, charge, or collect" (49 U.S.C. § 10704(a)(1)), rates that exceed outstanding ICC rate orders. The Court of Appeals' decision so holding was absolutely correct.

B. The Filed Rate Doctrine Does Not Sanction Unlawful Carrier Pricing Activities

The "filed rate doctrine" insofar as it applies to railroads, arises from the text of Section 10761(a) of the Act, which provides in pertinent part:

> *Except as provided in this subtitle [IV of Title 49]*, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title shall provide that transportation or service only if that rate for the transportation or

> service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff . . .

Id. (emphasis added). Contrary to Petitioners' and Federal Respondents' repeated assertions, Section 10761(a) is not a talismanic grant for carriers to file and collect any rate they see fit.

By its terms, Section 10761(a) is subject to exceptions "provided in [subtitle IV of Title 49]." Section 10704(a)(1) of the Act is set forth under subtitle IV of Title 49, and it expressly provides, as discussed above, that carriers cannot "publish, charge or collect" rates that violate ICC rate prescription orders. Thus, Section 10704(a)(1) provides a clear statutory exception to the rule set forth in Section 10761(a).[*] This interpretation of the Act was enunciated with authority in *Arizona Grocery* where this Court expressly ruled that Commission-prescribed rates "*take the place* of the legal tariff rates theretofore in force by the voluntary action of carriers" and "[a]s to such rates, *there is no difference* between the legal or published rate and the lawful rate." *Id.*, 284 U.S. at 387 (emphasis added). Thus, *Arizona Grocery* unequivocally holds that the Commission's prescribed rate, not the carriers' filed rate, establishes the only "lawful" rate that can be charged under the Act. As long recognized by the ICC, a contrary reading of the Act would deny the public "the protection of this

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[*] The textual interaction of Sections 10761(a) and Section 10704(a) is supported by the legislative histories of these two (2) sections. The ICC's power to prescribe rail rates now set forth in Section 10704(a) originated in Section 4 of the Hepburn Act, Pub. No. 337, § 4, 34 Stat. 584, 589 (June 29, 1906). In that Act, Congress also expressly amended what is now Section 10761(a) by adding that the carriers' duty to adhere to their filed rates was subject to exceptions enumerated in the Act. Hepburn Act § 2, Pub. No. 337, § 2, 34 Stat. 586. *See* S. Rep. No. 296, 59th Cong. 2d Sess. at 12-14 (1907). Clearly, the "exception" Congress was concerned with was the ICC's new ability to prescribe carrier rates.

Commission's orders during the time period they are in force." *Nashville Traffic Bureau* v. *Louisville & Nashville R.R.*, 53 I.C.C. 37, 38 (1919).[45]

Ignoring the Court's *Arizona Grocery* holding, Federal Respondents and Petitioners argue that the filed rate doctrine permits carriers to charge rates that violate ICC rate prescrip-

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[45] The lower federal courts have consistently followed *Arizona Grocery*. In the leading case of *Armour & Co.* v. *Louisiana Southern Ry.*, 190 F.2d 925 (5th Cir. 1951) ("*Armour*") the Fifth Circuit ruled that filed tariffs that violate Commission orders "could not legally annul the Commission's order." *Id.* at 928. The Commission has elsewhere expressly "subscribe[d] to the ruling in the *Armour & Co.* case" and held that its prescriptive orders, not conflicting filed rates, establish the lawful rates to be charged by carriers. *Foreston Coal International* v. *Baltimore & Ohio R.R.*, 349 I.C.C. 495, 500 (1979), *aff'd sub. nom. Island Creek Coal Sales Co.* v. *ICC*, 561 F.2d 1219 (6th Cir. 1977). According to Petitioners and Federal Respondents, the *Armour* holding applies only to rate prescription orders issued under Section 1(15) of the Act (now 49 U.S.C. § 11123) involving car service orders. While *Armour* did involve an order issued under § 1(15), its reasoning applies with equal force to an order issued under § 10704(a). There is nothing in the Act to suggest that Section 10704(a)(1) rate prescription orders are entitled to any less respect than Section 11123 rate prescription orders. Both are rate orders that the law requires carriers to obey.

Similarly, the courts have consistently rejected attempts by carriers to rely on the filed rate doctrine to legalize filed rates that violate the Act because "[a] carrier cannot avoid obligations imposed by statutory or common law by publishing a tariff to that effect." *Indiana Harbor Belt R.R.* v. *Jacob Stern & Sons*, 37 F. Supp. 690, 692 (N.D. Ill. 1941). *Accord Boston & M. R.R.* v. *Piper*, 246 U.S. 439, 445 (1918) (illegal tariff filings are "void"); *Carolina, C. & O. Ry.* v. *ICC*, 593 F.2d 1305, 1313 (D.C. Cir. 1979) (carriers may not circumvent special intrastate rate hearing and filing procedures simply by filing tariffs with ICC); *Mars Express, Inc.* v. *Masnik, Inc.*, 401 F.2d 891 (2d Cir. 1968) (motor carrier cannot charge filed rate over unauthorized route). *Cf. United Airlines, Inc.* v. *CAB*, 518 F.2d 256, 258 (7th Cir. 1975) (airlines cannot change CAB prescribed rate simply by filing a tariff inconsistent with that rate).

tion orders. In making this assertion, they place principal reliance on this Court's decision in *Arkansas Louisiana*, *supra*, 453 U.S. 571. In that case, which arose under the Natural Gas Act, a gas producer and gas purchaser had a contract that called for the producer to receive higher payments than those set forth in the applicable tariffs on file with the Federal Power Commission (FPC). The producer successfully sued in state court to obtain a damage recovery, but the state court action was set aside on grounds that the state court result violated the "filed rate doctrine," (*id.* at 579) "which forbids a regulated entity from charging rates for services other than those properly filed with the appropriate federal regulatory authority" (*id.* at 577). *Arkansas Louisiana* did not address the question before the Court in *Arizona Grocery*, i.e. whether a filed rate that conflicts with an outstanding agency rate prescription order is lawful; however, the Court's description in *Arkansas Louisiana* of the principles underlying the filed rate doctrine is clearly consistent with the Court's earlier *Arizona Grocery* holding.

In *Arkansas Louisiana*, the Court noted that the philosophical underpinnings of the filed rate doctrine "are the preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." *Id.* at 577-78, *quoting City of Cleveland* v. *FPC*, 174 U.S. App. D.C. 1, 10, 525 F.2d 845, 854 (1976). Obviously the ICC's "primary jurisdiction" is best served if regulated carriers adhere to its rate orders rather than if they file or maintain tariffs that the agency *may not* be aware of, or fully understand,[46] and then represent to the public that its

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[46] The ICC does not examine all submitted tariffs, but instead performs only random sample checks on filed tariffs to determine if they are legally filed. *See Southern Motor Carriers Rate Conference* v. *United States*, 667 F.2d 971, 972 (11th Cir. 1982).

filed rates are the only "lawful rates."[47] This is precisely the reasoning that supports the Court's *Arizona Grocery* decision.

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[47] None of the other "filed rate doctrine" precedents of this Court cited by Petitioners and Federal Respondents direct a different conclusion. *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, ___ U.S. ___, 102 S.Ct. 1815 (1982) held that shippers may not defeat carrier attempts to collect their proper charges by raising certain technical affirmative defenses. Therein, the Court did observe, however, that a "knowing violation of an order of the Commission" was unlawful under the Act (*id.* ___ U.S. ___, ___ 102 S.Ct. 1815, 1823, (1982). *Louden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939) held that it was unlawful for carriers to collect a rate less than one the ICC had found to constitute the prescribed minimum; *Davis* v. *Portland Seed Co.*, 264 U.S. 403 (1924) held shippers must pay a filed rate never found to be unreasonable by the ICC; *Pittsburgh, C.C. & St. C. Ry.* v. *Fink*, 250 U.S. 577 (1919) held that the filed rate controls over a lesser rate mistakenly charged by a rail carrier; and *Pennsylvania R.R.* v. *International Coal Mining Co.* 230 U.S. 184 (1913) held that it was unlawful to circumvent filed rates by resort to secret rebate contracts. Similarly, the three (3) ICC decisions relied upon by Petitioners and Federal Respondents, do not hold, as Petitioners and Federal Respondents assert, that rates filed in violation of outstanding ICC prescription orders are "lawful" rates. These three (3) cases are *Acme Peat Products, Ltd.* v. *Akron, C. & Y. R.R.*, 293 I.C.C. 510 (1954) ("*Acme Peat*"); *Kansas City Fuel Oil Co.* v. *Atchison, T. & S.F. Ry.*, 210 I.C.C. 134, (1935) ("*Kansas City Fuel Oil*") and *Dewey Portland Cement Co.* v. *Atchison, T. & S.F. Ry.*, 188 I.C.C. 97 (1932) ("*Dewey Portland*"). In *Acme Peat*, the Commission held that rate increases taken in excess "of those authorized by the Commission" were unlawful "to the extent that they included increases herein found not authorized." *Id.* 277 I.C.C. at 646. The same result was reached in *Dewey Portland*. Finally, in *Kansas City Fuel Oil*, the Commission found the assailed charges did not violate any ICC order. *Id.*, 210 I.C.C. at 136. Each of these cases contains *dicta* seized upon here by Petitioners and Federal Respondents saying that rates filed with the Commission "even though in contravention of its order would still be the legal rate." *Id.* at 136. This dicta, of course, conflicts with this Court's express holding in *Arizona Grocery* that prescribed rates

The Court of Appeals' conclusion that Petitioners' tariffs filed in violation of the *San Antonio I* order were unlawful is thus consistent with the tenets of the filed rate doctine and affirms the unassailable legal conclusion announced in *Arizona Grocery* and consistently followed thereafter that rates filed in violation of outstanding ICC prescription orders are unlawful.

CONCLUSION

For the reasons set forth above, the writ filed by the Petitioners should be dismissed, or if the writ is not dismissed, the decision of the Court of Appeals should be affirmed.

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July 17, 1982

"take the place of the legal tariff rates . . . and themselves become the legal rate." (284 U.S. at 387). Obviously, this Court's construction of the Act controls over the erroneous one set forth in *dicta* in isolated and dated Commission decisions, *see Federal Election Comm'n* v. *Democratic Senatorial Campaign Committee*, ___ U.S. ___, ___, 102 S.Ct. 38, 42 (1981), particularly where, as here, the ICC has later taken a contrary position on the issue. *See Foreston Coal International* v. *Baltimore & Ohio R. R.*, *supra*.

SAN ANTONIO COAL RATE CHRONOLOGY

Date	Rate (per ton)	ICC Order*
10/76	$10.16	*San Antonio I*
10/76	$10.93	X314B and X330
1/77	$11.37	X336
11/77	$11.94	X343
6/78	$12.42	X349
10/78	$16.12	*San Antonio II*
12/78	$17.01	X357
6/79	$17.21	X311
7/79	$17.23	*San Antonio III*
7/79	$18.18	X357 and X368
10/79	$19.04	X311
1/80	$19.25	X311A
2/80	$19.64	X374
4/80	$20.01	X375
4/80	$20.25	X311S
5/80	$20.41	X311B
7/80	$21.95	X375B
7/80	$15.83	*San Antonio I*
2/81	$16.00	X311C
2/81	$16.17	X311D
4/81	$16.29	X311E
5/81	$23.71	*San Antonio V*
6/81	$23.97	RCCR X001
7/81	$24.64	RCCR X002
10/81	$24.99	RCCR X003
1/82	$26.16	RCCR X082

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* "X" symbolizes an ex parte general rate increase order, followed by the ICC's docket number for the general rate increase proceeding.

Respondent's Brief

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Court, U.S.
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JUL 19 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1008

* * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

* * *

BURLINGTON NORTHERN INC. AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioners,

V.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Respondents.

* * *

On Writ of Certiorari To The
United States Court of Appeals
For The District of Columbia Circuit

* * *

BRIEF FOR RESPONDENT STATE OF TEXAS

* * *

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QUESTIONS PRESENTED

The respondent State of Texas adopts the view of the respondent City of San Antonio, Texas regarding the questions presented for this Court's consideration.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 5

CONCLUSION 9

TABLE OF AUTHORITIES

CASES **Page**

Board of Public Utility Com'rs. v. New York Telephone Co., 271 U.S. 23(1926) 7

Bristow City Water Co. v. Harris, 386 A.2d 1103, 1109 (R.I. 1978) 7

Burlington Northern, Inc. v. United States, 555 F.2d 631 (8th Cir. 1977) 4

Utility Consumers Council v. Public Service Commission, 585 S.W.2d 41 (Mo. 1979) 6,7

STATUTES

Interstate Commerce Act, 49 U.S.C. §10704(a)(1) 3,4,6

NO. 81-1006

• • •

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

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BURLINGTON NORTHERN INC. AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioners,

V.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Respondents.

• • •

On Writ of Certiorari To The
United States Court of Appeals
For The District of Columbia Circuit

• • •

BRIEF FOR RESPONDENT STATE OF TEXAS

• • •

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *San Antonio, Texas v. United States*, 631 F.2d 831 (D.C.Cir. 1980) (App. to Cert. Petn. B). In this opinion the Court of Appeals reviewed and vacated railroad rate prescription orders of the Interstate Commerce Commission

reported in *San Antonio, Texas v. Burlington Northern, Inc.*, 359 I.C.C. 1(1978)(App. to Cert. Petn. D) and in *San Antonio, Texas v. Burlington Northern, Inc.*, 361 I.C.C. 482 (1979)(App. to Cert. Petn. C). These two Commission orders modified a 1976 rate prescription order of the Commission reported in *San Antonio, Texas v. Burlington Northern, Inc.*, 355 I.C.C. 405 (1976)(App. to Cert. Petn. E). The Commission's 1976 order was affirmed by the United States Court of Appeals for the Eighth Circuit *sub nom. Burlington Northern, Inc. v. United States*, 555 F.2d 637 (8th Cir. 1977).

At the request of Petitioners, the Court of Appeals issued a decision affirming that the effect of its 1980 decision (631 F.2d 851) was to reinstate the Commission's 1976 prescriptive order (355 I.C.C.405) until that order was vacated by the Commission in the Commission's April 3, 1981 order set forth in *San Antonio, Texas v. Burlington Northern, Inc.*, 364 I.C.C. 887 (1981) (App. to Cert. Petn. F). The Court of Appeals' clarification decision is reported as *San Antonio, Texas v. United States, 655 F.2d 1341 (D.C. Cir. 1981)(App. to Cert. Petn. A).*

JURISDICTION

Petitioner attempts to invoke this Court's jurisdiction pursuant to 28 U.S.C. §1254(1). Respondent State of Texas takes no position whether jurisdiction is properly invoked.

STATEMENT OF THE CASE

In consideration of this Court's many responsibilities, the respondent State of Texas will not repeat the lengthy statements contained in other briefs and adopts the statement of the case as presented by respondent San Antonio, Texas. Texas would add, however, that it intervened in this matter before the Interstate Com-

merce Commission in order to promote the public interest of insuring that freight rates on western coal movements were just and reasonable and would not hinder coal conversion efforts of Texas utilities and industries needed to reduce our dependence on unstable foreign sources of energy. Texas believes that its interest was vindicated in substantial part by the decision of the Court of Appeals below. Texas files this brief in an effort to protect that interest properly vindicated by the court below.

SUMMARY OF ARGUMENT

The Court of Appeals determined that a rate prescribed by the Interstate Commerce Commission may be modified only by valid order of the Commission. The Court of Appeals properly construed the Interstate Commerce Act, and did not interfere in the primary jurisdiction of the Commission. Texas believes that petitioners failed to take appropriate steps which would have obviated the instant proceeding. Moreover, the harm alleged by petitioners resulting from their inaction is one which is incidental to engaging in a regulated activity and which has not been recognized by the courts.

ARGUMENT

Section 10704(a)(1) of the Interstate Commerce Act, 49 U.S.C. §10101 *et seq.*, provides in pertinent part:

> When the Interstate Commerce Commission, after a full hearing, decides that a rate charged or collected by a carrier for transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, or that a classification, rule, or practice of that carrier, does or will violate this subtitle, the Commission may prescribe the rate (including a maximum or minimum rate, or both), classification,

> rule, or practice to be followed....When a rate, classification, rule or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate and shall adopt the classification and observe the rule or practice prescribed by the Commission.

In a proceeding before the Interstate Commerce Commission (the Commission) referred to as *"San Antonio I"*, respondent San Antonio, Texas sought and obtained a prescriptive rate from the Commission pursuant to Section 10704(a)(1) regarding the movement of coal from Wyoming to San Antonio's electric generating facilities. The Commission's prescriptive rate was upheld in *Burlington Northern, Inc. v. United States*, 555 F.2d 631 (8th Cir. 197?). In later proceedings before the Commission referred to as *"San Antonio II"* and *"San Antonio III"*, the petitioner railroads sought and obtained a modification of the *San Antonio I* rate. The Commission's modified prescriptive rate stemming from those proceedings, however, was vacated on appeal. Thus, until the Commission in a proceeding referred to as *"San Antonio V"* vacated its rate prescription of *San Antonio I*, there had been no colorably valid modification, alteration, or rejection of the *San Antonio I*, prescribed rate.[1] The appropriate rate for the period in question is clear.[2] The Court of Appeals correctly held that *San Antonio I* remained in effect pending further Commission action.

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1. Texas notes that the *San Antonio V* vacation of *San Antonio I* is itself subject to question of validity and is indeed challenged by respondent San Antonio.

2. The period in question is defined by the parties as the time beginning with issuance of the Court of Appeals' mandate and ending with the Commission's vacation of *San Antonio I* in *San Antonio V*. The issue of reparations regarding movements before and after that period is not before the Court.

Petitioner railroads, who had sought the Court of Appeals to determine the effect of its judgment, now assert, in essence, that the lower court was incorrect in its determination and that the court lacked authority to make such a determination. These and other assertions of the railroads, as well as assertions of the Commission, are without merit for several reasons.

First, the attempt to characterize a court's legal determination as a foray into the legislative process is imaginative but inaccurate. The Court of Appeals did not set rates or in any way engage in judicial ratemaking. Accordingly, the court did not invade the primary jurisdiction of the Commission. The court simply construed the Interstate Commerce Act and correctly held that under that Act, a rate other than the *San Antonio I* rate could be charged only if set aside by the Commission. The Commission imposed the *San Antonio I* rate. The Commission's attempted modification of *San Antonio I* was invalid and therefore of no effect in altering the *San Antonio I* rate.[3] The court determined as a matter of law that until the Commission properly modified or vacated *San Antonio I,* the rate was still effective.

Second, reliance upon the filed rate doctrine is misplaced. Although Texas defers to San Antonio's brief concerning the doctrine, it must be noted here that the railroads again are attempting to ignore the method by which prescriptive rates are changed. That method

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3. The railroads and the Commission suggest that the *San Antonio II and III* rate is still effective, although vacated by the Court of Appeals, because in their view the orders were not vacated upon substantive grounds. A new rule of law is sought which would require administrative orders deemed invalid for certain reasons to remain effective. Invalid orders would be classified by the agency as "effective" or "ineffective". The absurdity of such a rule is obvious, for it would severely limit, or obliterate, judicial review of agency action. Moreover, the extension of such a rule would allow other legislative products, e.g., statutes, to remain effective although ruled invalid by the courts.

requires a valid Commission order modifying or vacating the prescriptive rate. Filing a tariff which is contrary to the rate can not alter the rate in the face of the clear wording of Section 10704. To allow rates filed pursuant to an invalid, vacated order to remain in effect would render Section 10704 meaningless.

Third, the railroads attempt to enervate and misinterpret the policy prohibiting retroactive rates. That is, the railroads assert that because they can not recover past undercharges if a higher rate is deemed to have been appropriate for a prior period, they should be allowed the higher rate pending determination.[4] The railroads misapply the policy which they attempt to revise. It is well settled that regulatory lag is a risk incident to engaging in a regulated enterprise and is a risk which is borne by the regulated entity. Accordingly, regulated industries are not allowed to recover for past undercharges when a higher rate than charged is held later to be proper.

> The utilities take the risk that rates filed by them will be inadequate, or excessive, each time they seek rate approval. To permit them to correct additional amounts simply because they have additional past expenses...is retroactive ratemaking....Past expenses are used as a basis for determining what rate is reasonable to be charged in the future in order to avoid further excess profits or further losses, but under the prospective language of the statutes...they cannot be used to set future rates to recover for past losses due to imperfect matching of rates with expenses. (Citations omitted)

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4. The railroads' argument is incomplete, for their proposed solution—receiving the Commission approved rate pending judicial review—would itself fail to make them whole should judicial review with remand to the agency ultimately determine they were entitled to a rate higher than that first prescribed.

Utility Consumers Council v. Public Service Commission, 585 S.W.2d 41, 59 (Mo. 1979). "The ruling prohibiting the imposition of retroactive rates holds true despite the fact that the company's loss might be attributable to the inevitable result of regulatory lag." *Bristow City Water Co. v. Harris*, 386 A.2d 1103, 1109 (R.I. 1978). It is clear that regulated companies are not entitled to recover for past losses. *See also, Board of Public Utility Com'rs. v. New York Telephone Co.*, 271 U.S. 23 (1926). The railroads assert that this doctrine requires them to be allowed to circumvent the regulatory requirement that prescribed rates may be changed only by valid Commission order. The doctrine upon which the railroads rely, however, establishes that there is no vested right to a higher rate at the instant the regulated entity desires. Rather, the entity must bear the risk that its rates may become less than optimal, and the entity must then alter its rates in a proper manner.[5] The administrative process and judicial review entail delay, but that delay is an incidental risk of doing business which those who wish to engage in a regulated enterprise must bear.

Finally, the railroads' appeal to equitable principles notwithstanding, it must be noted that if the railroads did receive lower rates than they had wanted during the period in question, those lower rates were a result of the railroads' own error or inaction. When San Antonio early suggested to the Court of Appeals that setting aside the Commission's rate orders in *San Antonio II* and *San Antonio III* would make the *San Antonio I* rate applicable, the railroads responded in the conclusion of their reply brief:

> If, however, the Court should grant either of the petitions for review in Nos. 78-2051 and

5. The railroads do not complain that the *San Antonio I* rate is confiscatory, but that they should receive higher rates, including an amount to subsidize less profitable operations.

> 78-2216, the appropriate relief would not be, as Petitioner San Antonio suggests, to reinstate the rate level prescribed in *San Antonio I.* The rate involved here is a carrier-made rate—not a Commission-prescribed rate, and the Supreme Court has expressly ruled that when Commission decisions in rate cases are set aside, the existing carrier-made rates continue in effect unless and until changed by the Commission upon remand.

The railroads erred; a prescribed rate can not become a carrier-made rate simply by filing a tariff pursuant to the prescription. The railroads erred further by resting upon their misinterpretation. A stay of the Court of Appeal's vacation of *San Antonio II* and *San Antonio III* could have been sought pending the Commission's decision on remand, or the railroads could have sought to vacate only portions of the Commission's order.[6] Alternatively, the railroads could have asked the Commission, even prior to the issuance of the mandate from the Court of Appeals, to vacate *San Antonio I,* thus allowing carrier filed rates to be in force.[7] The railroads failed to avail themselves of remedies which may have made this action unnecessary and should not be heard to complain now.

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6. The railroads contend that, as petitioners themselves, they "won" in the Court of Appeals. Even a cursory reading of the court's opinion belies the railroad's contention. Moreover, had the railroads been the true victors, the court's instructions on remand surely would have prevented the problem the railroads now allege.

7. Although the railroads now raise a concern that San Antonio would have contested such action as requiring a full hearing, it must be observed that the Commission finally did vacate *San Antonio I* in *San Antonio V* without a full hearing. Upon the Commission's vacation of *San Antonio I,* the shipper San Antonio was forced to pay the higher rate. Had the railroads been diligent, this case would not be before the Court today.

CONCLUSION

For the foregoing reasons, the writ filed by petitioners should be dismissed, or the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
OCT 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1008

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BURLINGTON NORTHERN INC. and SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	5
I. *WICHITA BOARD OF TRADE* AND *CONSOLIDATED RAIL* ARE NOT SUBJECT TO AN IMPLIED EXCEPTION FOR REVIVED RATE ORDERS	5
II. IF THERE WERE AN EXCEPTION FOR REVIVED RATE ORDERS, IT DOES NOT APPLY HERE	9
III. THE FILED RATE DOCTRINE IS NOT SUBJECT TO AN EXCEPTION FOR REVIVED RATE ORDERS	14
CONCLUSION	20

TABLE OF AUTHORITIES

Cases

	PAGE
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981)	19
Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co., 284 U.S. 370 (1932)	11, 14-15
Arrow Transp. Co. v. Southern Ry. Co., 372 U.S. 658 (1963)	5-8, 18
Atlantic Coast Line R.R. Co. v. Florida, 295 U.S. 301 (1935)	9
Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade, 412 U.S. 800 (1973)	5-8
Chicago, B. & Q. R. Co. v. United States, 242 F.Supp. 414 (N.D. Ill. 1965), *aff'd per curiam*, 382 U.S. 422 (1966)	9
Chicago, M. & St. P. Ry. Co. v. George A. Hormel & Co., 240 F. 381 (8th Cir. 1917)	11
Consolidated Rail Corp. v. National Ass'n of Recycling Industries, Inc., 449 U.S. 609 (1981)	5-8
FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965)	2
FTC v. Minneapolis-Honeywell Co., 344 U.S. 206 (1952)	1-2
Goss v. Lopez, 419 U.S. 565 (1975)	13
Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943)	13
Greene v. United States, 376 U.S. 149 (1964)	8
Interstate Commerce Commission v. Jersey City, 322 U.S. 503 (1944)	9
Louisville & Nashville R. Co. v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217 (1925)	8-9
Pennsylvania Ry. Co. v. International Coal Mining Co., 230 U.S. 184 (1913)	18

PAGE

Porter v. *Commissioner of Internal Revenue*, 288 U.S. 436 (1933) 11

San Antonio, Texas v. *Burlington Northern Inc.*, 650 F.2d 49, *clarified*, 652 F.2d 422 (5th Cir. 1981) 4, 18

Southern Pacific Transportation Co. v. *Commercial Metals Co.*, U.S. , 102 S.Ct. 1815 (1982) ... 17, 19

Southwestern Sugar & Molasses Co., Inc. v. *River Terminals Corp.*, 360 U.S. 411 (1959) 10

United States v. *SCRAP*, 412 U.S. 669 (1973) 5-8, 18

United States v. *Western Pacific R. Co.*, 352 U.S. 59 (1956) 10

Woolford Realty Co., Inc. v. *Rose*, 286 U.S. 319 (1932) 5

ICC Proceedings

Nashville Traffic Bureau v. *Louisville & Nashville R. Co.*, 53 I.C.C. 37 (1919) 18

San Antonio, Texas v. *Burlington Northern, Inc.*, 355 I.C.C. 405 (1976) (*San Antonio I*) ..... *passim*

San Antonio, Texas v. *Burlington Northern, Inc.*, 359 I.C.C. 1 (1978) (*San Antonio II*) ..... *passim*

San Antonio, Texas v. *Burlington Northern, Inc.*, 361 I.C.C. 482 (1979) (*San Antonio III*) ..... *passim*

San Antonio, Texas v. *Burlington Northern, Inc.*, 364 I.C.C. 887 (1981) ..... *passim*

Statutes

PAGE

Interstate Commerce Act:

49 U.S.C. § 10701(a) 18

49 U.S.C. § 10704(a)(1) 11, 14-18

49 U.S.C. § 10707 19

49 U.S.C. § 10761(a) 14-17

49 U.S.C. § 10762(d)(1) 16

49 U.S.C. § 11701(a) 17

49 U.S.C. § 11706 18

49 U.S.C. § 11902 ..... 14, 17

49 U.S.C. § 11903 ..... 14, 17

Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 13-14

Pub. L. No. 95-473, § 3 (1978) 16

Miscellaneous

S. Doc. No. 266, Vol. 13, 59th Cong., 2d Sess. (1907) ... 16

No. 91-1008

IN THE

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY BRIEF

INTRODUCTION

The responsive briefs filed by San Antonio, Texas ("San Antonio") and the State of Texas ("Texas") deal at length with the legal issues presented by the decision under review, but say comparatively little about its disruptive impact.[1]

[1] San Antonio's attempt to argue that this case is jurisdictionally out of time is frivolous. The decision under review clearly "resolve[d] a genuine ambiguity in a judgment previously rendered," and dealt with a question which was not "plainly and properly settled with finality." *FTC* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211-12 (1952). In its initial decision of June 9, 1989 (App.

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For example, petitioners Burlington Northern Inc. and Southern Pacific Transportation Co. ("the railroads") and the Federal Respondents demonstrated in their opening briefs that the decision below would undermine the Commission's exclusive authority to establish rate policy. (Pet. Br. at 20-28; Fed. Resp. Br. at 16-29.) San Antonio and Texas do not deny that a judicially-compelled rate rollback would interfere with the Commission's authority to establish maximum reasonable rates. Their only response is that "judicial ratemaking" is acceptable in this case because the Court of Appeals did not make any "subjective determination" of reasonableness. (S.A. Br. at 22, 29-30; Texas Br. at 5.)

Similarly, the railroads showed that the decision below would give rise to a new form of regulatory lag, and would create improper incentives or disincentives for the parties to seek judicial review of rate orders. (Pet. Br. at 26-28.) The State of Texas responds that "regulatory lag is a risk incident to engaging in a regulated enterprise." (Texas Br. at 6.) San Antonio asserts that judicial review would be "a hollow exercise" for a shipper without the windfall of a rate rollback and only the "speculative protection" of refunds. (S.A. Br. at 42.)

Finally, the railroads and Federal Respondents showed that the decision below is inequitable because it could impose a potential $20 million revenue loss on the railroads which, under the Act, they could not recover. (Pet. Br. at 34-36; Fed. Resp. Br. at 29-32.) San Antonio concedes that "this certainly is the direct consequence of the court's

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to Cert. Petn. B), the Court of Appeals did not even allude to the effect of its ruling on the applicable tariff rate. The extensive proceedings that ensued to resolve this question, before both the Commission and the Fifth Circuit, clearly belie the notion that the question had been "plainly and properly settled." Under the test enunciated in *Minneapolis Honeywell*, *supra*, and followed by this Court more recently in *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 378-84 (1965), this Court clearly has jurisdiction over the case.

decision" (S.A. Br. at 38), but *contends* the inequity is immaterial because it asserts the *San Antonio I* rate is not "confiscatory." (*Id.* at 40.)[5]

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[5] San Antonio's assertion that the *San Antonio I* rate would contribute $6 million a *year* in "profits" to the railroads (S.A. Br. at 5, 40) is only one of numerous factual distortions in its brief. The Commission found in 1976 that the *San Antonio I* rate would contribute $6 million a *year* above the railroads' *variable costs*. (App. to Cert. Petn. E-12-E-13.) Because variable costs as determined in *San Antonio I* included a rate of return equal to the cost of embedded debt, with no higher return allowed on equity capital (*id.* at E-26), and because the rate was set exactly equal to fully allocated costs (variable costs plus an allocated share of fixed costs), it would be more accurate to say that, even as of 1976, the *San Antonio I* rate produced *no profit* for the railroads.

A similar distortion is San Antonio's assertion that the railroads engaged in "bait and switch" tactics in 1974. (S.A. Br. at 4.) In *San Antonio II*, the Commission, without citing any facts, referred to alleged "bait and switch" tactics in the course of imposing a 30% penalty on the railroads for failing to produce sufficient evidence of actual operations. (App. to Cert. Petn. D-6, D-12.) However, in *San Antonio III* the Commission withdrew the 30% penalty, expressly *omitting* that it "cannot be supported" by the record. (App. to Cert. Petn. at C-7.) On brief to the D.C. Circuit, the Commission acknowledged that the railroads had withdrawn their rate quotation of $7.90 per ton, and had submitted a new proposal of $11.09 per ton, *before* San Antonio committed itself to a long term coal contract, thus negating any basis for a "bait and switch" allegation. (I.C.C. D.C. Cir. Br. at 4.)

A third distortion is San Antonio's assertion that the railroads filed tariffs with the Commission attempting to "shut down" San Antonio's rail service. (S.A. Br. at 14, 18.) The tariffs filed by the railroads in November 1980 (App. Unpub. I.C.C. Filings No. 5) and March 1981 (App. Unpub. I.C.C. Filings No. 14) would have required San Antonio to prepay the effective tariff charges—which San Antonio had refused to pay—*before* service was performed. Provided San Antonio paid the rate set forth in the tariff (which San Antonio was required to do by the Act in any event, see Part III *infra*) there would be no interruption in service. The dispute between the railroads and San Antonio has always been over the applicable rate, not whether the railroads would provide service.

The only serious attempt to respond to the pragmatic concerns raised by the railroads and Federal Respondents is San Antonio's assertion that the decision below will have little disruptive impact because the railroads can always "go to the ICC" and ask that the "revived" order be vacated. (S.A. Br. at 41.) In support of this notion, San Antonio observes that when the railroads filed a petition for clarification with the Commission in February 1981, the "Commission took quick action and vacated *San Antonio I* in April of 1981." (*Id.*)

The so-called "quick action" referred to by San Antonio did not, however, result in San Antonio resuming payments at the *San Antonio III* level until some four months after the petition for clarification had been filed—when the Court of Appeals for the Fifth Circuit, acting on an expedited basis, rejected San Antonio's challenge to the Commission's order[3] and it became effective on May 7, 1981. Although four months is indeed a relatively short time to obtain an order from the Commission[4] *and* a ruling from the Court of Appeals, even this amount of time would impose irreparable losses on carriers. Moreover, as the railroads noted in their opening brief (at 39-40), a petition to the Commission to reopen or vacate is subject to *no* time limitations. Thus, there is no assurance that carriers could always obtain Commission-ordered relief from judicially-revived orders within four months.

In short, the position adopted by the railroads and Federal Respondents would preserve the Commission's exclusive authority to set rate policy, would avoid creating a new version of regulatory lag, and would prevent the crea-

[3] *San Antonio, Texas* v. *Burlington Northern Inc.*, 650 F.2d 49, *clarified*, 652 F.2d 422 (5th Cir. 1981).

[4] It is now *over two years* since the Court of Appeals' mandate issued remanding the *San Antonio II* and *San Antonio III* orders to the Commission for further proceedings. To date, the Commission has not yet issued a decision in the remanded proceedings.

tion of a windfall gain for San Antonio, and imposition of an irreparable loss on the railroads, of nearly $20 million. The position adopted by the Court of Appeals and supported by San Antonio and Texas would have the opposite consequences. As Justice Cardozo once stated in another context, "[s]ubmission to such mischiefs would be necessary if the statute were so plain . . . as to leave no room for choice between that construction and another." *Woolford Realty Co., Inc.* v. *Rose,* 286 U.S. 319, 330 (1932). Fortunately, not only is there "room for choice" in this case; the Act, as construed by this Court, clearly indicates that the opposite result is compelled as a matter of law.

ARGUMENT

I. *WICHITA BOARD OF TRADE* AND *CONSOLIDATED RAIL* ARE NOT SUBJECT TO AN IMPLIED EXCEPTION FOR REVIVED RATE ORDERS

San Antonio concedes that this Court's decisions in *Arrow Transportation Co.* v. *Southern Ry. Co.,* 372 U.S. 658 (1963), *United States* v. *SCRAP,* 412 U.S. 669 (1973), *Atchison, T. & S.F. Ry. Co.* v. *Wichita Board of Trade,* 412 U.S. 800 (1973), and *Consolidated Rail Corp.* v. *National Ass'n of Recycling Industries, Inc.,* 449 U.S. 609 (1981), prohibit "judicial ratemaking." (S.A. Br. at 24-25.) Nevertheless, San Antonio advances two contentions in an effort to establish that this prohibition does not apply in this case.[5]

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[5] San Antonio also contends that there is no "judicial ratemaking" in this case because the Court of Appeals did not "enjoin any rates the 'Commission has not declared unreasonable.'" (S.A. Br. at 25-26, quoting *Wichita Board of Trade,* 412 U.S. at 819.) Although the Court of Appeals did not enjoin any rates in this case, it *did* issue a declaratory judgment holding that the *San Antonio III* rate—a rate the Commission has *never* found to be excessive or otherwise unreasonable—is "unlawful." As the railroads explained in their opening brief, the asymmetry in the Commission's power to make retroactive rate adjustments means

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First, San Antonio maintains that "judicial rate-making" is permissible in this case because the Court of Appeals made no "subjective determination" that the rate level established by the Commission is too high. (S.A. Br. at 24-26, 29-30.) However, *Arrow, SCRAP, Wichita Board of Trade,* and *Consolidated Rail* do not turn on whether there has been a "subjective determination" of unreasonableness by a reviewing court. Under these authorities, the Commission has "sole and exclusive power" to determine maximum reasonable rates. *Arrow, supra,* 372 U.S. at 667. The subjective intent of a reviewing court is simply irrelevant in determining whether it has usurped this power.[6]

Indeed, San Antonio's "subjective judgment" argument is totally inconsistent with *SCRAP, supra.* There, a reviewing court enjoined a general rate increase on recyclable material—not because the court independently or "subjectively" determined that the higher rates were unreasonable, but because it concluded that the Commission had violated the National Environmental Policy Act (NEPA). 412 U.S. at 682. This Court set aside the reviewing court's order because, even if the Commission had violated NEPA, the court was "without power to issue such an injunction." *Id.* at 691. The Court explained:

> "[W]e found in *Arrow* that any survival of a judicial power to grant interim injunctive relief would represent an undesirable interference with the orderly exercise of the Commission's power of suspension. Similarly, to grant an injunction in the present context, *even though not based upon a substantive consideration of the rates,* would directly interfere with the Commission's decision. . . ." (*Id.* at 697-698, emphasis supplied.)

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that there is no functional distinction between a judicial *injunction* against rate increases and a judicial *declaration* that existing tariff rates are unlawful. (Pet. Br. at 26-28.) San Antonio has not responded to this point.

[6] There is a sharp conflict between the decision below and the Commission's jurisdiction over rate policy. The Commission has *never* found that the carriers' tariff rate at the *San Antonio III* level is unreasonably high. Moreover, the Commission *has* decided that the "interim" 1976 *San Antonio I* rate was *not* automatically

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If, as *SCRAP* holds, a court lacks power to interfere with rates even though it has made no "substantive consideration" of lawfulness, then surely it lacks power to interfere with rates when it has made no "subjective" substantive consideration of lawfulness.

San Antonio next asserts that *Wichita Board of Trade* and *Consolidated Rail* do not apply in cases involving multiple rate orders because the reviewing court's order in such cases necessarily revives the "last lawful" administrative decision. (S.A. Br. at 26-29.) This argument, however, assumes its own conclusion: that "the application of the *Consolidated Rail* rule . . . is dependent for its validity in this case upon the elimination, somehow, of the *San Antonio I* order." (*Id.* at 34.) On the contrary, the rationale of *Wichita Board of Trade* and *Consolidated Rail* applies with just as much force in cases involving multiple rate orders as it does in cases involving a single order.

Under *Wichita Board of Trade* and *Consolidated Rail*, when a reviewing court vacates and remands a Commission rate order for further explanation of the Commission's policies, the court is "without authority" to dictate the level of rates which may be charged pending further Commission action. *Consolidated Rail*, 449 U.S. at 612. In other words, when "the court's opinion leaves open the possibility that the [rate level set by the Commission] may eventually prevail," *id.*,[7] the Commission has "the sole and exclusive power" and the court has no "judicial power" to affect the

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revived, and that to revive it would be inequitable, particularly in light of the "significant changes in the governing legal standards since the *San Antonio I* prescription was established." (Pet. Br. at 10, 13-15, 31, 37; Fed. Resp. Br. at 7-10). The *San Antonio I* rate reflected capital costs at only an embedded debt level, making no allowance for the higher cost of equity capital, and failed to make any provision for differential pricing (Pet. Br. at 3-5)—a practice which both the Commission and the Court of Appeals later approved. (Pet. Br. at 6, 8.)

[7] Significantly, San Antonio does not deny that under the D.C. Circuit's June 9, 1980, decision the *San Antonio III* rate may eventually prevail.

level of rates. *Arrow, supra,* 372 U.S. at 667-668; *SCRAP, supra,* 412 U.S. at 696.

Clearly, the existence of some earlier rate level established or approved by the Commission has no bearing on whether the new maximum rate level set by the Commission "will eventually prevail." In cases involving multiple rate orders, as in other cases, a decision by a reviewing court to remand a rate order to the Commission for further clarification or explanation does *not* preclude the Commission from reinstating the overturned order if it concludes, after further consideration, that the order is justified. In these circumstances, therefore, as in cases involving but one rate order, the reviewing court has *no power* to affect the rates charged pending the Commission's reconsideration.

San Antonio has cited no case which even suggests that the principles established in *Wichita Board of Trade* and *Consolidated Rail* do not apply when a court deals with successive rate orders. Every case relied upon by San Antonio was decided at least eight years before this Court's decision in *Wichita Board of Trade.* More importantly, in none of the cases relied upon by San Antonio was a court confronted with the question whether a judicial decision setting aside a Commission rate order requires a rollback in rates to the level of the "last lawful" order. That question not being presented, none of the isolated comments referred to by San Antonio represents a *holding* of a court in any way inconsistent with *Wichita Board of Trade* and *Consolidated Rail.*[8]

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[8] *Greene* v. *United States,* 376 U.S. 149, 161 (1964), does not suggest, even in dictum, that this Court's earlier decision vacating the revocation of petitioner's security clearance automatically reinstated the "last valid administrative decision." Rather, it was the *district court's* intervening order, entered with the consent of the Government, which had such an effect. See *id.* at 151 n.1.

The other cases relied upon by San Antonio all involved passing comments which cannot even be elevated to the level of *obiter dicta. Louisville & Nashville R.Co.* v. *Sloss-Sheffield Steel & Iron Co.,* 269

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II. IF THERE WERE AN EXCEPTION FOR REVIVED RATE ORDERS, IT DOES NOT APPLY HERE

Even if San Antonio were correct in asserting that *Wichita Board of Trade* and *Consolidated Rail* are subject to an exception for revived rate orders, that exception would not apply here for the simple reason that the Court of Appeals erred in concluding—contrary to the Commission's own considered view[9]—that the Commission's *San Antonio I* order had been "revived".

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U.S. 217 (1925), did not involve rate orders and tariffs but rather a series of reparation orders. When a carrier challenged the last order, which *reduced* the amount it owed, the Court found the last order was equivalent to the next-to-last order with an offer of remittitur. *Atlantic Coast Line R.R. Co.* v. *Florida*, 295 U.S. 301 (1935), apparently relied upon for a statement not found in the majority opinion but in the dissent, again involved an intervening decision by a second tribunal. (See Pet. Reply to Opposition To Petition For Certiorari at 3-4 & n.3.) *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503 (1944), concerned the interplay between the Interstate Commerce Act and the Emergency Price Control Act of 1942. In passing, the Court noted that the lower court's injunction had resulted in continuation of an earlier rate—a fact which was apparently uncontested by any party. Finally, *Chicago, B & Q. R. Co.* v. *United States*, 242 F. Supp. 414 (N.D. Ill. 1965), *aff'd per curiam*, 382 U.S. 422 (1966), contains no statement at all suggesting that invalidation of a Commission order requires a return to earlier rate levels. In fact, the court expressly noted that it was "not considering or passing on the question" whether the freight rates at issue "should be modified or changed. . . ." *Id.* at 417.

[9] Given the conflict between the Court of Appeals and the Commission, the court at the very least should have referred the question of the proper interpretation of *San Antonio I* to the Commission pursuant to the primary jurisdiction doctrine. (Pet. Br. at 30-32.) San Antonio asserts that the railroads are barred or estopped from relying on the primary jurisdiction doctrine because they previously asked the Court of Appeals to clarify that its June 9, 1980, decision did *not* revive *San Antonio I*, thereby implicitly recognizing the court's jurisdiction to decide the question. (S.A. Br. at 34-37.) However, there is no inconsistency between asking the court to declare that it has no power to reinstate *San Antonio I*,

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As the railroads explained in their opening brief (pp. 29-30), the Commission's decision in *San Antonio II* did two things: it lifted the temporary rate prescription established in *San Antonio I*, and it established a new maximum rate ceiling for the future. The D.C. Circuit, in its June 9, 1980, decision, ruled only on the second determination. Thus, when *San Antonio II* was vacated, it was vacated in part: the Court set aside the new rate ceiling, but did not disturb—or even address—the Commission's decision to lift the *San Antonio I* rate prescription.

San Antonio advances essentially two erroneous contentions in opposition to the argument that *San Antonio II* was set aside only "in part."

First, San Antonio introduces an argument based on a metaphysical distinction between "vacation" and "modification" of rate prescription orders. "Vacation" of a prescription, according to San Antonio, "obliterates" the order in its entirety, and restores pricing freedom to the railroads. (S.A. Br. at 31-32.) "Modification," however, changes the rate, but assertedly leaves the prescriptive nature of the order intact. (*Id.*) San Antonio asserts that *San Antonio II* and *San Antonio III* "modified" but did not "vacate" *San Antonio I*. Thus, when the D.C. Circuit set aside the orders in *San Antonio II* and *San Antonio III*, the "prescriptive"

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or that San Antonio has no right to ignore the filed tariff, and objecting when the court concludes that *San Antonio I*, by its own terms, "did continue in force." (App. to Cert. Petn. A-3.) The former issues are questions of law, which the court can resolve as well as the Commission. The latter is a question of the Commission's *intent. Cf. Southwestern Sugar & Molasses Co., Inc.* v. *River Terminals Corp.*, 360 U.S. 411 (1959); *United States* v. *Western Pacific R. Co.*, 352 U.S. 59 (1956) (referring questions involving the proper interpretation of tariffs to the Commission pursuant to the primary jurisdiction doctrine.)

aspect of *San Antonio I* somehow continued in effect. *San Antonio II* and *San Antonio III* having been set aside by the court, the only rate left to plug into this disembodied "prescriptive" requirement was *San Antonio I*.

This argument is casuistic in the extreme. Rate orders are not divided into a "rate" component and a "prescription" component, with one or both components subject to alteration by the Commission. Every Commission rate order either prescribes a rate, or prescribes a maximum or minimum rate (or both). 49 U.S.C. § 10704(a)(1). Thus, if the Commission wants to replace a rate prescription order with another rate prescription order, it simply lifts the first prescription order and enters a new prescription order. It does not "modify" the rate component of the first order while leaving the "prescriptive" component intact. There is no support in the statutes or caselaw for the distinction San Antonio purports to draw."

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[10] None of the cases cited by San Antonio supports its purportedly "well known" distinction. *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, 387-388 (1932), explicates the difference between "legal" and "lawful" rates (see n.12 *infra*). *Porter* v. *Commissioner of Internal Revenue*, 288 U.S. 436, 442 (1933), holds that the words "alter" and "modify" were not used interchangeably in the Revenue Act of 1926. *Chicago, M. & St. P. Ry. Co.* v. *George A. Hormel & Co.*, 240 F. 381, 384 (8th Cir. 1917), concludes that a report containing findings of fact and conclusions of law was not set aside when it was incorporated by reference in a second report, and the second report was then set aside.

Nor does San Antonio's distinction receive any support from the fact that the railroads filed certain pleadings with the Commission in which they used the word "vacate" in asking the Commission to lift *San Antonio I*. (S.A. Br. at 7, 32.) On other occasions, the railroads used the word "modify." (*E.g.*, J. App. 7.) This only confirms that there is no functional difference in this case between a "modification" or a "vacation" of *San Antonio I*. Because *San Antonio I* did only one thing—prescribe a specific rate for the future (App. to Cert. Petn. F-2)—a decision to "modify" *San Antonio I* would lift that prescription just as much as would a decision to "vacate" *San Antonio I*.

Even if San Antonio's distinction were valid, the conclusion San Antonio attempts to draw from the distinction is not supported in fact. The assertion that *San Antonio II* "modified" *San Antonio I*, setting aside the rate but leaving the "prescription" intact, is totally belied by the Commission's own description of its holding in *San Antonio II*:

> "We find that a rate not exceeding $16.12 per ton would be lawful on the basis of the existing record, and our prior finding is modified accordingly. *This finding only indicates what constitutes a maximum reasonable rate level on this traffic. It is not in any sense a requirement that the railroads increase their rates on this traffic to any particular level.*" (App. to Cert. Petn. D-18, emphasis supplied.)

If the railroads were not *required* by *San Antonio II* to file a rate of $16.12 per ton, then the Commission was clearly changing *both* the rate *and* the "prescriptive" nature of *San Antonio I*. In terms of San Antonio's own metaphysics, *San Antonio II* "vacated" *San Antonio I*.[11]

Second, San Antonio maintains that it is "sheer fantasy" to think that the D.C. Circuit did not set aside the portion of *San Antonio II* which lifted *San Antonio I*. (S.A. Br. at 33.) The reason this is a "fantasy," apparently, is that San Antonio itself has always argued that "no change in the *San Antonio I* rate prescription was justified." (*Id.*)

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[11] San Antonio attempts to find significance in the fact that the Commission, in *San Antonio II*, spoke of "modifying" *San Antonio I*. However, because *San Antonio I* did only one thing—prescribe a specific rate for the future—there is no practical difference in this case between "modifying," "lifting," or "vacating" *San Antonio I*. In any event, it is not true, as San Antonio asserts, that "the Commission's *San Antonio II* and *III* decision will be searched in vain for any language that 'lifts' or vacates the *San Antonio I* rate prescription." (S.A. Br. at 31.) Separate opinions filed by Commissioners Stafford and Christian in *San Antonio II* clearly show that the Commission considered "modification" to be synonymous with "lifting" the prior *San Antonio I* prescription. (See App. to Cert. Petn. D-18, D-19.)

The question, however, is not what San Antonio thought was justified; the question is what the D.C. Circuit *decided*. (App. to Cert. Petn. B-43.) It is fundamental that the meaning of a court's judgment "is to be interpreted in light of the court's opinion, findings and conclusions of law." *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 296 (1943); see, *e.g.*, *Goss* v. *Lopez*, 419 U.S. 565, 571 n.6 (1975).

When the D.C. Circuit's June 9, 1980, opinion is examined, it will be seen that the court was concerned exclusively with the Commission's justification *for the new rate ceilings* established in *San Antonio II* and *San Antonio III*. The court did *not* question—or even address—the Commission's rationale for lifting *San Antonio I*.[12] Accordingly, the court did not set aside that portion of *San Antonio II* which lifts *San Antonio I*.

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[12] The Commission's decision to lift *San Antonio I* rested on two findings. The first was based on evidence of rate comparisons. The Commission stated that

> "rate comparisons, when used to help determine a maximum reasonable rate are of considerably less probative value than if the comparable rates were from a more established structure such as that in the East. However, *the comparisons offered by both parties do suggest that the present rate is below a maximum reasonable rate and that modification . . . is warranted.*" (App. to Cert. Petn. D-7, emphasis supplied.)

The Court of Appeals did not rule on the Commission's conclusion that rate comparisons suggested "modification . . . is warranted." (App. to Cert. Petn. B-10 n.25.) It *affirmed* the Commission's decision not to rely on rate comparisons in setting a rate maximum. (*Id.* at B-9-B-11.)

The second reason relied upon by the Commission for lifting *San Antonio I* was the enactment of the 4-R Act, amending the Interstate Commerce Act. As the Commission acknowledged, *San Antonio I* was decided on a pre-4-R Act record and did not mention the recently-enacted statute. (App. to Cert. Petn. D-12.)

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III. THE FILED RATE DOCTRINE IS NOT SUBJECT TO AN EXCEPTION FOR REVIVED RATE ORDERS

The Interstate Commerce Act unequivocally forbids carriers from charging *or receiving* any different compensation for rail service "from the rate specified in the tariff." 49 U.S.C. § 10761(a); *see also id.* §§ 11902, 11903. Although San Antonio devotes seven pages in its brief to the filed rate doctrine, its explanation as to why it was not required to pay "the rate specified in the tariff" from July 24, 1980, to May 7, 1981, boils down to a single proposition: that *San Antonio I* was revived and carriers are required to conform their filed rates to effective rate orders.

This, however, totally begs the question. Even assuming for purposes of argument that *San Antonio I* had been revived and that the railroads were therefore under an obligation to conform their tariff rate to the *San Antonio I* level, it does *not* follow (1) that San Antonio was excused from the duty imposed by § 10761(a) and the Elkins Act provisions, 49 U.S.C. §§ 11902, 11903, to obey the filed tariff rate, or (2) that San Antonio's appropriate remedy was to indulge in self-help.

San Antonio erroneously construes 49 U.S.C. § 10704 (a)(1) and a dictum in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, 387-388 (1932). These authorities establish, in the words of *Arizona Grocery*, that when the Commission prescribes a specific rate for the

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Consequently, the *San Antonio I* rate prescription had been set according to traditional ratemaking criteria, which required only that a rate make some contribution to fixed costs. (*Id.*) The new Rule of Ratemaking of the 4-R Act, in contrast, "requires that the Commission give due consideration to the revenue needs of railroads in addition to their fixed costs." (*Id.*) The Commission therefore concluded that "proper implementation of the rate-

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future, the carrier "is bound to conform to the order of the Commission." *Id.* at 387.[15]

However, nothing in § 10704(a)(1) or in *Arizona Grocery* suggests that a carrier's violation of its duty to "conform to the order of the Commission" *excuses* the shipper from its obligation to pay the filed tariff rate. San Antonio attaches great weight to the fact that § 10761(a) is prefaced with the phrase "[e]xcept as provided in this subtitle." (S.A. Br. at 44-45.) According to San Antonio, this means that the obligation to pay the tariff rate, as required by § 10761(a), is subject to an "exception" when a carrier fails to conform to a Commission rate order, as required by § 10704(a)(1) and *Arizona Grocery*. This argument fails for several reasons.

First, the qualification "except as provided in this subtitle" applies only to the first sentence of § 10761(a), requir-

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making guidelines contained in the 4-R Act requires a modification of the rate. . . ." (*Id.* at D-14.) The Court of Appeals did not question the Commission's determination to consider railroad revenue needs in individual rate proceedings or its conclusion that the failure of *San Antonio I* to undertake any such consideration required "modification of the rate. . . ." (App. to Cert. Pets. B-31-B-41.)

[15] San Antonio implies that the *Arizona Grocery* dictum means not simply that carriers must conform their tariffs to rate prescription orders, but that such orders, by their own force, "take the place" of tariffs—in other words, that no tariff need be filed when the Commission enters a rate prescription order. (S.A. Br. at 45.) However, such interpretation of the dictum is wholly inconsistent with the Act, which requires that a tariff be filed for every movement, whether a rate has been prescribed or not. 49 U.S.C. § 10761(a). Moreover, taken in context the *Arizona Grocery* dictum is not concerned with the distinction between orders and tariffs, but with the distinction between "lawful" and "legal" rates. What it says is that once the Commission prescribes a specific rate, that rate becomes the sole *lawful* rate, and "takes the place" of any *legal* rates established by the carrier. 284 U.S. at 387-88.

ing that a tariff be filed and published for all transportation service, not to the second sentence of § 10761(a), which sets forth the obligation to pay the tariff rate."

Second, even if the qualifying phrase "except as provided in the subtitle" applied to the second sentence of § 10761(a), there is no suggestion in the statute that § 10706(a)(1) was the "exception" alluded to in § 10761(a).[14] San Antonio

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[14] The 1978 recodification of the Interstate Commerce Act "may not be construed as making a substantial change in the laws replaced." Pub. L. No. 95-473, § 3 (1978), *reprinted* in 49 U.S.C.A. at 1-2 (West Supp. 1982). The limited application of the "exception" clause in recodified § 10761(a) appears even more clearly in § 6(7), its statutory predecessor. Section 6(7) contains three clauses, each beginning with the phrase "no carrier . . . shall" or "nor shall any carrier." The qualifying phrase San Antonio relies upon—"unless otherwise provided by this chapter"—appears only in the first clause, dealing with filing and publishing tariffs, not in the second and third clauses, setting forth the filed rate doctrine. (The full text of § 6(7) is set forth in Appendix A to this brief.)

[15] The statute and legislative history suggest that the phrase "except as provided in this subtitle" probably refers not to § 10706(a)(1), but to a portion of § 6(3) recodified as § 10762(d)(1). As explained in n.14 *supra*, the "exception" language appeared in the first clause of § 6(7), prohibiting transportation unless the carrier has filed and published a tariff "in accordance with the provisions of this Act." The section of the Act dealing with the method and manner of filing and publishing tariffs was § 6(3). When these sections are examined together, it appears that the "exception" clause of § 6(7) was intended to refer back to a "provided" clause in § 6(3). Section 6(7) says that, "unless otherwise provided," a carrier must file and publish a tariff "in accordance with the provisions of this Act." Section 6(3) then sets forth the provisions for filing and publishing a tariff, "provided," however, that the Commission may "in its discretion and for good cause shown" specify other provisions. (The full text of § 6(3) is set forth in Appendix A to this brief.)

Significantly, both the "exception" clause of § 6(7) and the "provided" clause of § 6(3) were added to the Interstate Commerce Act by the Hepburn Act of 1906. S. Doc. No. 266, Vol. 13, 59th Cong., 2d Sess. (1907).

apparently believes that any section of the Act which imposes a duty upon carriers automatically becomes an "exception" to the second sentence of § 10761(a). This Court squarely rejected such a contention in *Southern Pacific Transportation Co. v. Commercial Metals Co.*, U.S. , 102 S. Ct. 1815, 1821 (1982), and should do so here as well.

Finally, even if the "exception" provision applied to the second sentence of § 10761(a), and even if that proviso referred to § 10704(a)(1), San Antonio's argument would still be unavailing because §§ 11902 & 11903—the Elkins Act provisions—contain no such exception clause. San Antonio's interpretation of the "exception" clause of § 10761(a) thus reduces to the untenable proposition that when a carrier fails to conform its tariff rate to a Commission rate order, the shipper is excused from paying the tariff rate under § 10761(a) but is still subject to civil penalties, fines and imprisonment for disregarding the tariff under §§ 11902 & 11903.

In any event, even if a shipper believes that a carrier has violated § 10704(a)(1), this does not mean that the shipper's *remedy* for such a violation is to indulge in self-help. Neither § 10704(a)(1) nor *Arizona Grocery* speaks to the remedies a shipper may invoke when it believes that a carrier has violated its duty to conform its rates to an outstanding rate order. Those remedies are set forth in 49 U.S.C. §§ 11701-11710. Section 11701(a) provides that the Commission may begin an investigation "on its own initiative or on complaint" to determine whether a carrier "is violating this subtitle," including, of course, § 10704(a)(1). If the Commission finds after such an investigation that the carrier is violating an outstanding rate order, the Commission may take "appropriate action to compel compliance," *id.*, including the issuance of an order directing the carrier

to amend its tariff.[16] In addition, §§ 11705(b)(2) & 11705 (c)(1) provide that "a person" may file a complaint with the Commission seeking reparations for injuries sustained "as a result of an act or omission of that carrier in violation of this subtitle," including, again, § 10704(a)(1).

In short, the Interstate Commerce Act provides that when a shipper believes a carrier has failed to conform its published rate to an outstanding rate order, the shipper's remedy is to file a complaint with the Commission—not to engage in self-help by disregarding published tariffs. The Commission, after a hearing, can then protect the shipper by ordering the carrier to change its published rate, and by awarding reparations for past periods. Nothing in the remedial provisions of §§ 10701 *et seq.* authorizes a shipper to flout the tariff and unilaterally reduce the amount it pays for transportation service.[17]

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[16] 49 U.S.C. § 11705(a) provides that "a person injured" because a carrier "does not obey an order of the Commission" may bring "a civil action to enforce that order under this subsection." However, under the principles established by *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658 (1963), and *United States* v. *SCRAP*, 412 U.S. 669 (1973), a shipper may not bring an action under § 11705(a) to enforce a *rate* order until there has been a final determination of unlawfulness *by the Commission, i.e.*, the Commission has issued an order determining that the filed tariff rate violates an outstanding order. *San Antonio, Texas* v. *Burlington Northern Inc.*, 650 F.2d 49, *clarified*, 652 F.2d 422 (5th Cir. 1981). As a practical matter, therefore, the initial remedy of a shipper who believes that a filed rate is inconsistent with an outstanding rate order is to file a complaint with the Commission. If the Commission issues an order finding the rate in violation of a rate order, the shipper can then enforce the second order pursuant to § 11705(a).

[17] See, *e.g.*, *Pennsylvania Ry. Co.* v. *International Coal Mining Co.*, 230 U.S. 184, 197 (1913) (quoted in Pet. Br. at 42); *Nashville Traffic Bureau* v. *Louisville & Nashville R. Co.*, 53 I.C.C 37, 38 (1919)

Finally, the policies underlying the filed rate doctrine—to protect the Commission's primary jurisdiction over rate disputes and to insure that the Commission is informed about the rates being charged and collected, *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 581-82 (1981)—compel the conclusion that there should be no exception for tariff rates alleged by a shipper to be inconsistent with a rate order. Disputes frequently arise about the meaning of ICC rate orders or, as here, over whether a particular order applies to a given tariff rate. If the shipper were permitted to decide these matters unilaterally and disregard the filed tariffs—or if a court were permitted to resolve the dispute—then the Commission would be effectively deprived of its primary jurisdiction over rate controversies, and would have no way of knowing what rates are being paid. On the other hand, if the shipper is required to pay the tariff rate until the Commission decides whether the tariff is in conflict with the order, the Commission's control over rate policy is preserved and the shipper's interests (as well as the carriers') are fully protected.[18]

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[18] The availability of administrative relief provides a complete answer to San Antonio's contention that application of the filed rate doctrine would permit carriers to "deliberately file rates in excess of those prescribed in a Commission order." (S.A. Br. at 43.) A shipper can ask the Commission to suspend and investigate any carrier-filed rate that is alleged to be unlawful for any reason, including violation of a prior order. 49 U.S.C. § 10707. The Commission has ample powers to control carriers which persist in unlawful practices. *Commercial Metals*, *supra*, 102 S.Ct. at 1823. If a carier disregards a Commission decision, the shipper can then obtain judicial relief. See n.16 *supra*.

CONCLUSION

For the foregoing reasons, and those set forth in the railroads' opening brief, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A

49 U.S.C. § 6(7) (1970):

"§ 6, par. (7). *Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

49 U.S.C. § 6(3) (1970):

"§ 6, par. (3). *Change in rates, fares, etc.; notice required; simplification of schedules.* No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon

the schedules in force at the time and kept open to public inspection: *Provided,* That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further,* That the Commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest."

Reply Brief for the United States

Office - Supreme Court, U.S.
FILED
OCT 26
ALEXANDER L. STEVAS,

No. 81-1008

In the Supreme Court of the United States

OCTOBER TERM, 1982

BURLINGTON NORTHERN, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS

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TABLE OF AUTHORITIES

Cases:	Page
Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571	13
Atchison, T. & S.F. Ry. v. *Wichita Board of Trade*, 412 U.S. 800	1, 3
Atlantic Coast Line R.R. v. *Florida*, 295 U.S. 301	5
Arizona Grocery Co. v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370	10, 12
Burnham Van Service, Inc. v. *United States*, 624 F.2d 41, cert. denied, 450 U.S. 912	13
Chicago, B. & Q. R.R. v. *United States*, 242 F. Supp. 414, aff'd, 382 U.S. 422	5
Consolidated Rail Corp. v. *National Association of Recycling Industries, Inc.*, 449 U.S. 609	1
FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134	3
Ford Motor Co. v. *NLRB*, 305 U.S. 364	3
Greene v. *McElroy*, 360 U.S. 474	3
Greene v. *United States*, 376 U.S. 149	3-4
ICC v. *Jersey City*, 322 U.S. 503	5
Jersey City v. *United States*, 54 F. Supp. 315	5
Louisville & N. R.R. v. *Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217	4
Rate Structure Investigation, Part 7, Grain and Grain Products Within The Western District and For Export, 329 I.C.C. 824	5
SEC v. *Chenery Corp.*, 332 U.S. 194	3
United States v. *United States Smelting*, 339 U.S. 186	3

Statutes:	
Interstate Commerce Act, 49 U.S.C. (Supp. IV) 10101 *et seq.*:	
49 U.S.C. (Supp. IV) 10704(a)(1)	12
49 U.S.C. (Supp. IV) 10761(a)	11
49 U.S.C. (Supp. IV) 11902	11
49 U.S.C. (Supp. IV) 11903	11

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REPLY BRIEF FOR THE FEDERAL RESPONDENTS

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1. In our opening brief we argued (at 16-26) that the court of appeals' order cannot be reconciled with this Court's decisions in *Consolidated Rail Corp.* v. *National Association of Recycling Industries, Inc.*, 449 U.S. 609 (1981), and *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973), which preclude a reviewing court from determining interim transportation policy in the context of a remanded proceeding by establishing rate levels that may be charged pending Interstate Commerce Commission reconsideration of a rate order.

a. Respondent San Antonio suggests (Br. 26) that this case is distinguishable from *Consolidated Rail* and *Wichita Board of Trade* because of "the presence of a pre-existing * * * rate order that * * * control[led] the maximum rea-

sonable rate."[1] The court here, respondent argues, unlike the reviewing courts in *Wichita Board of Trade* and *Consolidated Rail*, did not enjoin rates that the Commission has not declared unreasonable. Rather, the court merely "revived" a previous Commission order prescribing a lower rate, and then declared "unlawful" filed rates that were inconsistent with that earlier order.

The distinction is without significance. As we pointed out in our initial brief (at 26), the effect of the court of appeals' ruling is precisely the same as if the court had directly enjoined railroad rates in excess of the *San Antonio I* level following its remand decision. Because it was the court of appeals, and not the Commission, that determined the rates the carriers could charge pending remand, this case presents a clear instance of judicial ratemaking that interferes with the Commission's primary jurisdiction over rates.

Moreover, contrary to San Antonio's contention (Br. 22, 25), the court of appeals' action is not redeemed merely because the court did not make a "subjective determination" or an "independent appraisal" of the reasonableness of the San Antonio coal rate level. Whether or not the court made such a "subjective determination" is of no moment, for the fact remains that the court has prevented the Commission from making its own independent appraisal, in the remanded proceeding, of the reasonableness of the rate for the period in controversy, July 1980 to April 1981. For the reasons stated by the Commission in its decision formally vacating the *San Antonio I* rate (to the extent it might still have been operative) in April 1981 (Pet. App. F-7 to F-8), the Commission's original appraisal of the reasonableness of the San Antonio rate in 1976 had no continuing validity in 1980

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[1] San Antonio's contention (Br. 1-3) that the petition for certiorari was untimely—a contention that was raised by San Antonio without success at the petition stage (Br. in Opp. 14 n.17)—is insubstantial for the reasons stated in petitioners' reply brief (Pet. Rep. Br. 1-2 n.1).

and 1981. The court of appeals, however, in the decision under review, already has established the maximum reasonable rate level for that period with no opportunity for retroactive application of the Commission's findings in the proceeding on remand.

b. Respondent San Antonio purports to draw support for its "revival" theory (Br. 26-27) from cases establishing that the consequence of vacating an administrative order is to render the vacated order without further force and effect.[2] We do not quarrel with this proposition; however, as the court of appeals itself recognized, "'[t]he only consequence of suspending [a Commission rate] order is that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable'" (Pet. App. A-5, quoting from *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, *supra*, 412 U.S. at 818-819 (plurality opinion)).

San Antonio next cites (Br. 27-29) a number of cases in support of the proposition that judicial vacation of the second of two ICC rate orders necessarily reinstates the previous order. The cited cases, however, are of no help to San Antonio.

The first case, *Greene* v. *United States*, 376 U.S. 149 (1964), did not involve ICC rate orders at all, and cannot be read as establishing a general principle that vacation of the second of two administrative orders automatically reinstates the first. In *Greene*, the Court noted (*id.* at 155) that it previously had held that the government acted unlawfully in revoking Greene's security clearance (*Greene* v. *McElroy*, 360 U.S. 474 (1959)). On remand, the district court, with the consent of the government, voided and expunged all records adverse to Greene. 376 U.S.

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[2] *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, *supra*, 412 U.S. at 818 (plurality opinion); *United States* v. *United States Smelting*, 339 U.S. 186, 198 (1950); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 200-201 (1947); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 144-145 (1940); *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373-374 (1939).

at 151 n.1. In the course of deciding whether Greene's claim for damages should be considered under a 1955 regulation or under a more stringent regulation issued in 1960 after Greene had filed his administrative claim for compensation, the Court found that the district court's expungement order effectively reinstated Greene's original security clearance (*id.* at 161). Of course, the determination that an individual should be considered to have retained his security clearance after entry of a judicial order voiding and expunging adverse findings on which revocation of that clearance was predicated is not the same as concluding that a prior rate order automatically is revived when a subsequent order prescribing a higher maximum rate is vacated and remanded for further explanation of the reasonableness of the new rate.

Although the remaining cases cited by San Antonio did involve ICC orders, none of them addressed the precise issue raised here, concerning the effect of a judicial remand on existing tariff rates.[3] This is understandable be-

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[3] The cited cases contain no considered holdings in San Antonio's favor, but only passing references that nod in the general direction of the position San Antonio espouses.

In *Louisville & N. R.R.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925), the ICC issued successive orders awarding the shipper reparations from the railroad. The second order resulted in a reduction of the amount owed by the railroad. Nevertheless, the carrier, contending that certain charges inadvertently omitted in the first order had been added in the second, asked the Court to void the second order because it had been issued without affording the carrier proper notice. This Court merely noted in passing that "[i]f lack of notice to the Louisville & Nashville rendered the later order void, the original order remained in full force." *Id.* at 223. This observation was unnecessary to the disposition of the case because the Court ultimately affirmed the second order and therefore did not have an opportunity to address the consequences of setting it aside. Moreover, the ICC orders involved in *Sloss-Sheffield* were reparation orders, involving the calculation of damages following a finding that past rates had exceeded a reasonable

cause all of these cases predate *Consolidated Rail* and *Wichita Board of Trade*, in which this Court clarified the

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maximum; the Commission's underlying determination as to reasonableness was not at issue in this Court. In contrast to *Sloss-Sheffield*, the court of appeals in this case has revived and given current effect (for the period at issue) to a maximum reasonable rate order where the underlying basis for the reasonableness determination on which that order was based has been eroded by subsequent legal and economic developments. See Pet. App. F-7 to F-8. Moreover, unlike the situation here, there is no suggestion in the Court's opinion in *Sloss-Sheffield* that if, in fact, the Commission's first reparation order had been revived, it could not again have been corrected by the Commission following proper notice to the railroads.

The next case relied upon by San Antonio, *Atlantic Coast Line R.R.* v. *Florida*, 295 U.S. 301 (1935), has been extensively discussed in our principal brief (at 27-29). As we explained, *Atlantic Coast Line* is particularly unhelpful to San Antonio's position because the Court's *holding* in that case, which was based on an analysis of the pertinent equitable considerations, supports our argument for reversal, and also because the particular Commission order referred to in passing in the *dissenting* opinion relied on by San Antonio differed substantially from the Commission's *San Antonio I* order at issue here.

In *ICC* v. *Jersey City*, 322 U.S. 503 (1944), the Commission originally had prescribed an 8¢ passenger fare for a Jersey City commuter line. After further hearing, the Commission authorized increases, first to 9¢ and finally to 10¢. The orders subsequently were invalidated by a three-judge court. *Jersey City* v. *United States*, 54 F. Supp. 315 (D. N.J. 1944). On review, this Court upheld both Commission authorized increases. In describing the procedural background of the case the Court merely observed—and did not, as San Antonio claims (Br. 29), actually hold—that the effect of the district court's order, until it was set aside, was "to continue the 8-cent rate" originally prescribed. 322 U.S. at 512.

San Antonio's final authority is not a decision of this Court, but an ICC decision, *Rate Structure Investigation, Part 7, Grain and Grain Products Within The Western District and For Export*, 329 I.C.C. 824 (1967). That decision was issued in response to a district court order vacating the second of two Commission decisions prescribing grain rates. *Chicago, B. & Q. R.R.* v. *United States*, 242 *F. Supp.* 414 (N.D. Ill. 1965), aff'd, 382 U.S. 422 (1966). The district court did not discuss the effect of its vacation order and the Commission on remand simply assumed, without discussion, that its original prescription order remained in effect.

law by establishing that a reviewing court is simply without authority to determine the level of rates that a carrier may charge pending reconsideration of a remanded rate order by the Commission.

c. In our opening brief we argued (at 30-32) that, in view of the various alternative courses of action open to the court of appeals, that court erred in concluding that the Commission, rather than the court, was responsible for restoring the *San Antonio I* order and producing an inequitable result. In particular, we asserted that because the court of appeals in its remand decision did not question or address that portion of the Commission's *San Antonio II* order that had lifted the *San Antonio I* rate prescription (as distinct from the Commission's rationale in both *San Antonio II* and *III* for prescribing maximum rates at a specific level) the court could have avoided the inequitable result by construing its remand decision as having vacated *San Antonio II* and *III* only "in part" rather than in their entirety.

San Antonio first contends (Br. 31) that the Commission in fact never "lifted" or "vacated" *San Antonio I* but merely "modified" that prescription in its subsequent orders. This semantic distinction is without meaning under the Interstate Commerce Act and disregards the practical effect of the relevant Commission orders.

There is no provision in the Act that requires the Commission expressly to "vacate" an existing prescription before that prescription may be revised. Where, as here, maximum rate prescriptions pertaining to a single transportation movement are issued in succession, it is clear that by each subsequent prescription the Commission has determined that the previous prescription no longer reflects the maximum reasonable rate and that the carrier's pricing freedom should no longer be held to the previous level. Whether or not the Commission actually declares in so many words that its prior prescription is being vacated, the fact that it prescribes a new rate necessarily accomplishes that task. There simply is no difference between,

on the one hand, vacating *San Antonio I* and simultaneously prescribing a new maximum rate and, on the other hand, modifying the *San Antonio I* prescription. The same result is accomplished—lifting the prior maximum rate order in favor of a new prescription.[4]

The important point in this regard is that the court of appeals did not find fault with—or even address—the Commission's finding in *San Antonio II* that the *San Antonio I* rate should be modified because of changed circumstances (see Pet. App. D-4, D-13 to 14, D-18). The court's remand decision addressed only the rationale for the actual amount of increase authorized by the Commission.[5] We recognize, of course, as does San Antonio (Br.

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[4] The only meaningful distinction in this context between "vacation" and "modification" is not relevant here. If the Commission has not determined a new maximum rate but has a sufficient basis for concluding that an existing prescription is not valid, it of course cannot modify that prescription but can only vacate the existing restraint on the carrier's pricing freedom. This is the only basis for the difference to which San Antonio refers (Br. 32 n.31) between the language of the Commission's orders in *San Antonio II* and *III* and that of its April 1981 decision formally vacating *San Antonio I* to the extent it may have remained viable following the court of appeals' remand decision.

[5] Contrary to San Antonio's suggestion (Br. 33), there is no basis for concluding that the court of appeals set aside the Commission's determination that the *San Antonio I* prescription was too low. Instead, the court set aside the Commission's actions in *San Antonio II* and *III* establishing new maximum reasonable rates primarily because, in the court's view, the Commission "provide[d] no defensible rationale for the inclusion of the seven percent increment" (Pet. App. B-39); accordingly, the Commission was directed on remand "to explain more fully its reasons for selecting a particular increment, if any, above fully allocated costs, making sure that its decision is based on a thorough analysis of the relevant interests" (*id.* at B-41). Although San Antonio maintains that it argued in the court of appeals against a change in the *San Antonio I* rate prescription, the fact remains that the court of appeals did not address this point in its decision. The only conclusion that logically can be drawn from the reasons articulated by the court for its order remanding the case to the Commission is that the portion of the *San Antonio II* decision that lifted the maximum rate prescribed in *San Antonio I* remained intact.

34), that the court of appeals did not explicitly state that it was vacating *San Antonio II* and *III* "in part" so as to reflect its disposition of the two distinct aspects of the Commission's orders—*i.e.*, the "lifting" of *San Antonio I* and the setting of a specific new maximum rate prescription. We submit, however, that the court of appeals should have construed its remand order in this fashion in order to avoid intruding on the Commission's primary jurisdiction and reaching an inequitable result.

Alternatively, as we explained in our initial brief (at 31-32), the court of appeals should have deferred to the Commission on the important question whether the Commission intended its 1976 order in *San Antonio I* to be subject to reinstatement in 1980 following reversal of the *San Antonio II* and *III* decisions. San Antonio argues (Br. 34-37), however, that, because the Commission took the position that it was up to the court of appeals to decide whether the effect of its remand order had been to revive *San Antonio I*, the Commission should not now be heard to complain that the court has intruded on its primary jurisdiction.

San Antonio misapprehends the Commission's position. Although the Commission explicitly recognized that the legal question of the effect of the court's mandate was appropriately before the court of appeals, the Commission did not anticipate that the court would rest its decision on the court's own interpretation of the Commission's 1976 *San Antonio I* rate order. The court of appeals' holding is based on the conclusion that "*San Antonio I did* continue in force" (Pet. App. A-3; emphasis added). Had the Commission recognized that the decision concerning the effect of the court's mandate would turn on an interpretation of what the *Commission* intended in its 1976 order, it could have provided (and should have been afforded an opportunity to provide) the court with its own interpretation of its 1976 order in light of intervening events.[6]

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[6] As San Antonio points out (Br. 36), the court of appeals was apprised of the Commission's change of position with respect to the

2. a. San Antonio effectively concedes that the court of appeals' decision creates the potential for irreparable harm.[7] The court of appeals' decision conceivably could result in the transfer of more than $19 million dollars from the railroads to San Antonio. That result would not be a product of any substantive evaluation of the reasonableness of the rate for the period between July 1980 and May 1981, but would be solely the product of the court of appeals' mechanistic and erroneous view of the effect of its mandate. Nevertheless, San Antonio characterizes the concern with irreparable harm as nothing more than a criticism of the operation of the Interstate Commerce Act itself (Br. 39): "[*A*]*ny time* the Commission prescribes a maximum rate less than the railroads wish to charge, they are 'irreparably injured' in the sense that they cannot recoup money in excess of the prescription."

This contention does not address the issue before the Court. If the Commission ultimately should determine in the remanded proceeding that the railroads were entitled to charge a rate not only in excess of *San Antonio I* but also above the level prescribed by the Commission in *San Antonio II* and *III*, then the railroads clearly could not collect charges in excess of the tariff rates that were set at the *San Antonio II* and *III* levels. That kind of "inequity" to the railroads, if such it be, is a well accepted

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effect of the court's mandate. The Commission did not, however, address the narrower, but ultimately crucial, question of what, if anything, the language of the 1976 *San Antonio I* order ("this order shall continue in full force and effect until the further order of the Commission" (Pet. App. E-14)) meant in 1980 following vacation of the Commission's two "further order[s]" (*i.e., San Antonio II* and *III*).

[7] The potential for irreparable harm in this case results from the Commission's inability retroactively to apply its ultimate findings regarding a maximum reasonable rate to the period between July 1980 and April 1981, assuming that the Commission finds a rate in excess of *San Antonio I* to have been justified for that period. San Antonio states (Br. 38) that "[w]hile this certainly is the direct consequence of the court's decision, the court correctly held that it had no power under the Act to set aside this alleged inequity."

incident of the regulatory scheme,[8] but it is not at issue here. The inequity here results from the railroads' inability to collect the tariff rate on file even if the Commission should conclude that that rate was within a maximum reasonable rate for the period.[9] To argue, as does San Antonio (Br. 39), that the Act places the burden on the railroads to have a prescription order set aside begs the question whether *San Antonio I* actually was reinstated.[10]

b. San Antonio seeks (Br. 41-42) to minimize the effect of the "regulatory lag" created by the court of appeals' decision,[11] first by faulting petitioner railroads for not seeking vacation of the *San Antonio I* order until February 1981, and then by citing the Commission's "quick action" in vacating *San Antonio I*. But the series of actions taken by the railroads to collect the published tariff rate immediately following San Antonio's unilateral decision to pay only the *San Antonio I* rate belies the suggestion of dilatory tactics on their part. The Commission's action, although conceded by all parties to be expeditious, nevertheless did not take effect until several

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[8] See *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 387 (1932).

[9] The remand decision left open the possibility that the Commission's vacated maximum rate prescription might prevail.

[10] We decline to respond to San Antonio's speculative assertions (Br. 40) concerning the merits of the rate controversy now before the Commission. Whether or not the *San Antonio I* rate level is profitable or confiscatory, the railroads will suffer irreparable injury under the court of appeals' holding if the Commission finds on remand that the maximum reasonable rate was higher than *San Antonio I*, because the Commission will be unable to apply its finding to the period at issue here.

[11] The "regulatory lag" arises from the possibility that whenever a Commission rate prescription is set aside, an outdated prescription may thereby be resurrected until the infirmities in the remanded order can be corrected by the Commission or the old prescription formally lifted.

months after the railroads had filed their petition to vacate *San Antonio I.*

Moreover, beyond the immediate context of this case, the principal problem presented by the court of appeals' holding is that the instant that the second of two Commission decisions is vacated, the earlier, "revived" prescription is deemed to establish the maximum rate for the post-vacation period until the revived prescription can be set aside or a new rate is found to be reasonable. As we explained in our main brief (at 32-34), it may not be open to the Commission to act summarily in such a situation because of the as yet unresolved question whether or not a "full hearing" is required in order to set aside a revived prescription (see Pet. App. F-8 to F-10).

Finally, San Antonio suggests (Br. 42) that a shipper would not be adequately protected by the Commission's authority to award refunds if a railroad's tariff rate were allowed to remain in effect pending a Commission decision in the remanded proceeding. Although, in the normal case, the statutory refund remedy should be adequate to protect a shipper in San Antonio's position, there is nothing in the Act to prevent a shipper from petitioning the Commission for relief pendente lite.

3. In our main brief (at 34-39), we demonstrated that the decision below rewards San Antonio's unilateral decision to pay a rate other than the tariff rate and therefore it cannot be squared with the "filed rate doctrine," requiring adherence to published tariffs by shippers and carriers alike. In the Interstate Commerce Act, that doctrine is expressed in 49 U.S.C. (Supp. IV) 10761(a), which provides that a "carrier may not charge or receive a different compensation" than the tariff rate.[12] Instead of directing San Antonio to pursue its remedies under the Interstate Commerce Act, the court of appeals de-

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[12] See also 49 U.S.C. (Supp. IV) 11902 and 11903, which provide substantial civil and criminal penalties for failing to file tariffs or knowingly accepting less than the tariff rate.

clared the railroads' filed tariff rates unlawful, thereby sanctioning San Antonio's 10-month resort to self-help and raising the possibility that other shippers may follow San Antonio's lead and similarly resort to self-help in reliance on the decision below.

San Antonio's argument in response does not come to grips with our contention. San Antonio claims (Br. 42-49) that where an outstanding Commission rate prescription exists, the shipper is obligated to pay only the prescribed rate, not the rate set forth in the tariff. In support of this claim, San Antonio cites 49 U.S.C. (Supp. IV) 10704(a)(1), which forbids carriers from publishing or collecting rates in excess of those prescribed by the Commission. But the provisions of Section 10704(a)(1) are beside the point, because the question whether the railroads' tariff rates were in excess of those prescribed by the Commission was precisely the matter in controversy during the period at issue, beginning in July 1980, when the court of appeals' mandate became effective and San Antonio unilaterally decided to pay the carriers at the *San Antonio I* rate level rather than at the level of the published tariff. The question presented here is not whether the railroads were obligated to file a tariff at an arguably prescribed level, but whether, given the existence of a controversy over the proper rate, San Antonio could lawfully pay a rate other than the tariff rate pending resolution of that controversy.[13] The function of the filed

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[13] For this reason, San Antonio's reliance on *Arizona Grocery, supra*, 284 U.S. at 387-388, is misplaced. In the particular passage relied upon by San Antonio, this Court, in dicta, described the legal effect of a Commission rate prescription and the statutorily established method for a carrier to follow in order to have the prescription set aside if the carrier believes the rate is too low. The Court did not purport to address the separate question, at issue here, that arises when there is an ongoing controversy over whether a prescription has in fact been revived.

The Court in *Arizona Grocery* distinguished between a "legal" rate, *i.e.*, the rate published in a tariff, and the "lawful" rate, a rate meeting the substantive standards of reasonableness under

rate doctrine in this context is to establish with certainty the rate that a shipper is obligated to pay until the controversy over the proper rate is resolved by the Commission. See *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 581-582 (1981).

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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Interstate Commerce Commission

OCTOBER 1982

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the Act. The import of this distinction in the Court's discussion is that because the Commission could only prescribe a reasonable (lawful) rate consistent with the Act, when it does prescribe a specific rate there is no difference between the legal and lawful rate. We do not read this passage as indicating either that there is a mystical "union" of the tariff rate and the prescribed rate, or that tariff filing requirements are rendered inapplicable or irrelevant, as San Antonio suggests. See, *e.g.*, *Burnham Van Service, Inc.* v. *United States*, 624 F.2d 41, 43 (5th Cir. 1980), cert. denied, 450 U.S. 912 (1981). The Court simply was not addressing the problem presented when a tariff sets forth a rate that is different than an arguably prescribed rate, as here, or even where the tariff differs from a rate that all parties agree has been prescribed.

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Docket Sheet

NO. 81-1008-CFX	TITLE Burlington Northern, Inc., et al., Petitioners v. United States, et al.

DOCKETED	COURT
Nov. 24, 1981	United States Court of Appeals for the District of Columbia Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: Robert Eden Martin
	Counsel for Respondents: Solicitor General, C. Michael Loftus, Donald G. Avery, William L. Slover
Nov. 24, 1981	Petition for writ of certiorari filed. (Record filed).
Nov. 24, 1981	Appendix filed.
Dec. 18, 1981	Order extending time for the Government to file a response to the petition until Jan. 27, 1982.
Dec. 18, 1981	Order extending time for respondent City of San Antonio to file a response to the petition until Jan. 27, 1982.
Jan. 28, 1982	Brief for respondent San Antonio, Texas in opposition filed
Jan. 27, 1982	Order extending time for the Government to file a response to the petition until Feb. 5, 1982.
Feb. 8, 1982	Brief for the Federal Respondents in support of petition filed.
Feb. 10, 1982	DISTRIBUTED. 2-26.
Feb. 11, 1982	Reply brief for the petitioners filed. (D).
Mar. 1, 1982	Petition for writ of certiorari GRANTED.

Apr. 7, 1982	Order extending time to file the joint appendix and petitioners' brief on the merits until May 15, 1982.
May 14, 1982	Brief for the Federal Respondents filed.
May 17, 1982	Joint appendix filed.
May 17, 1982	Brief for the petitioners filed.
May 25, 1982	Motion of the Solicitor General for divided argument filed.
June 7, 1982	The motion of the Solicitor General for divided argument is GRANTED.
June 7, 1982	Order extending time to file the non-federal respondents brief on the merits until July 17, 1982.
July 17, 1982	Brief for respondent San Antonio, Texas filed.
July 19, 1982	Brief for respondent State of Texas filed.
September 3, 1982	CIRCULATED.
Oct. 12, 1982	Reply brief for the petitioner filed. (D).
Oct. 26, 1982	Reply brief for the federal respondents filed. (D).
Nov. 3, 1982	ARGUED.